definition of political offense in international extradition." The discussion will be opened by J. Reuben Clark, Jr., the assistant solicitor of the Department of State.

ADDRESS OF MR. J. REUBEN CLARK, JR.,
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Mr. President, and Gentlemen of the Society: Notwithstanding Sir Edward Clark's declaration that "the decisions of the American judges are the best existing expositions of the duty of extradition in its relations at once to the judicial rights of nations and the general interests of the civilization of the world," there are few branches of our law which present more unsolved and difficult problems than does the law governing matters of extradition, and of these problems none are more indefinite and complex and few have received less consideration and adjudication than those which are presented for determination when a fugitive pleads to defeat surrender that the offenses with which he is charged are political.

Obviously the questions that may arise in connection with this matter may be divided roughly into two classes: *first,* those questions arising out of and affecting our international rights and obligations both under our extradition and other treaties and under the general rules of international law,— in other words, questions relating to the international aspect of extradition; *secondly,* those which have their source in the general principles of our constitutional law and concern only or chiefly the rights of civil liberty guaranteed by the constitution. Inasmuch as the text set for the present discussion seems broad enough to cover both phases of this subject, the present paper will, so far as may be, confine itself to a brief sketch dealing with certain phases of the second division named.

It is a matter worthy of note that in spite of the deep-rooted feeling of the American people against surrendering political offenders to foreign governments, the Congress appears neither to have seen fit, nor deemed it necessary to lay down any statutory rules or regulations regarding this matter, but has left the question to be dealt with by the executive and the judicial branches of the government. The

sources, therefore, to which one must look for the principles governing this question are, the extradition treaties themselves, the decisions of the judiciary, and the determinations of the executive.

The materials from which the present discussion must be built are, however, most scanty, there being scarcely a half score of political refugee cases upon which either the courts or the executive have been called to pass; and of these cases but one has reached the Supreme Court.[1] Therefore, while in this paper it will be aimed to present, wherever possible, what is, or at least what seems to be the law, rather than to discuss what ought to be, yet it must be said that as few points of the law have been decided, it will be necessary to base the conclusions hereafter given upon certain broad general principles that govern matters of extradition rather than upon adjudged cases determining particular points. It ought moreover to be said that the conclusions herein suggested, owing to this undetermined condition of the law, are advanced rather as tentative proposals upon which to base debate than as mature and well-established propositions.

The particular subject selected for present treatment may be appropriately dealt with under four heads: *first,* the nature of the defense raised when the fugitive pleads that the crime with which he is charged is political; *second,* the tribunal, judicial or executive, to which such a defense should be addressed; *third,* the tribunal, judicial or executive, by which the sufficiency of this defense must be finally judged and determined; and *fourth,* a consideration of some of the essential elements which go to make up a political offense as those elements may be drawn from the language of the treaties, the decisions of the courts, and the determinations of the executive.

I. *The nature of the defense raised when the fugitive pleads that the crime with which he is charged is political.*

(a) At the outset of the discussion I venture to suggest, merely, a question which perhaps lies at the base of this branch of the subject: "Is the so-called 'political crime or offense' (in the sense in which the term is here used) to be regarded as properly a crime at

[1] *Ornelas* v. *Ruiz,* (1895), 161 U. S. 502.

all, from the point of view of international extradition?" In other words, is not the so-called political crime internationally a neutral or colorless act to which no criminality does or can attach, and for this reason an act which is outside the purview of extradition treaties?

The question appears to be not without some difficulty. On the one hand, it may be urged that crimes classed as political are usually the more serious ones, such as normally are designated by the terms murder, arson, robbery, etc.; that the acts as charged and committed are punishable in the demanding country as common crimes and the whole undertaking of the fugitive as treason; that in all cases in which the defense is raised the fugitive admits the commission of the acts charged; that the term itself "political crime or offense" is in words an admission that the act is a crime and that the very defense offered is that there should be no surrender because the *crime* committed is political; and, finally, that, therefore, the defense that the crime committed was a political crime is really an excuse for, if not, indeed a justification of, the crime charged.

It is not clear, however, that this disposes of the question. May it not be, in the first place, that the term "crime or offense" as used in this connection would better be understood as meaning "act," and that the real defense to extradition is that the act charged is not a crime at all since it is a political act? The following considerations give, perhaps, some color to this suggestion. First, internationally the form of government of a state is immaterial. France the empire is the same France as France the republic, because the state never dies. Since, therefore, the form of government is internationally immaterial, it would seem that internationally the acts producing the change in form are likewise immaterial; and since internationally the acts are colorless, must it not be concluded that they are not crimes? Moreover, it appears clear that political "crimes or offenses" lack some of the elements of ordinary crimes. For example, the act will lack malice in the sense in which that term is used in criminal law, and it is not individual, — that is, the act is the act of the political party to which the individual belongs, the individual being merely the instrument (hardly the agent) by

which the act is committed. The force of the latter suggestion is apparent where in a war between two nations, one man belonging to the force which has invaded the territory of the other shoots and kills one of the opposing force in battle. It can scarcely be said in such a case that although the one shooting has killed the other, that he has, therefore, committed murder; the act was not personal, but political; and such it would seem must be the status of a similar act committed in a struggle between two contending political factions in a state. In such a case the act is the result of a political movement; it is not the act of the individual but of the party to which he belonged; it is ordered and directed by that party; and often the actor must commit the act or himself suffer punishment. That this view is tenable is strongly suggested in those cases in which, there having been two contending factions in a state, it is sought to extradite fugitives of the party previously in power, but overthrown by rebellion. Here it would seem clear that acts done to maintain the government would be acts of state, and as such no more properly crimes than the killing of a man in battle.

It is therefore believed that a political crime or offense may perhaps be considered as not in any real sense a crime, within the meaning of international agreements for extradition.

(b) A second question arising in connection with this branch of the subject may be stated as follows: "Is the defense that the crime charged is political in its character, a plea to the jurisdiction of the court or should it be classed as a plea to the merits?"

At first glance, the inclination is to consider that the plea is one in bar, going to the merits, — a plea that may perhaps be assimilated to the plea of confession and avoidance in civil matters. It is believed, however, that the plea should rather be regarded as a plea to the jurisdiction.

However, before considering this question in detail, attention should be called in a preliminary way to the fundamental proposition, which should be kept always in mind, that an extradition commissioner, or judge acting as such, has, in extradition matters, only such powers as have been expressly conferred upon him by the statutes or by the extradition treaties; and that in a given case

unless he has authority specifically given by treaty or by statute, he has no authority or jurisdiction whatsoever.[2]

The following considerations, based upon this fundamental principle, seem to lead to the conclusion that the plea of political offense is a plea to the jurisdiction and not to the merits.

In the first place, as has been already suggested, if a political act is not deemed as between nations, a crime within the meaning of the extradition treaties, there would seem little doubt but that the plea which raises the question runs to the jurisdiction and not to the merits. The principle controlling such a case would seem to be the same as that which would be invoked if a fugitive were arrested on a charge of murder and the demanding government should submit to the commissioner evidence showing that the murder, so-called, with which the fugitive was charged was the killing of a man in an actual battle during a war between two nations. In such a case it would appear that the commissioner should dismiss the proceedings; and the duty so to do would arise, not because such a defense would be a plea of justification, but because the act charged did not, under our jurisprudence, constitute the crime of murder; it being clear that the crime charged in extradition proceedings must, under the authorities, be a crime within the meaning of our own jurisprudence.[3] If a "political offense" be of this nature, the same rule would of course apply.

Again, it seems to be a settled principle of our law that there is no authority to surrender a fugitive unless the crime with which the fugitive is charged is specifically included among the extraditable crimes specified by treaty.[4] But if crimes not specifically included can not be considered as being within the treaty and so are not extraditable crimes, *a fortiori* crimes which are specifically excluded from the operation of the treaty can not serve as the basis of an extra-

[2] *In re Vandervelpen*, (1877), 14 Blatch. 137.

[3] 4 Op. Atty.-Gen. 330; *In re Adutt*, (1893), 55 Fed. 376; *Cohn* v. *Jones*, (1900), 100 Fed. 639; *In re Frank*, (1901), 107 Fed. 272; *Benson* v. *McMahon*, (1887), 127 U. S. 457; *Grin* v. *Shine*, (1902), 187 U. S. 181; *Wright* v. *Henkel*, (1902), 190 U. S. 40.

[4] 6 Op. Atty.-Gen. 85; id. 432; and see *Terlinden* v. *Ames*, (1901), 184 U. S. 270; *Ex parte M'Cabe*, (1891), 46 Fed. 363; *Ex parte Dos Santos*, (1835), 2 Brock. 493, Fed. Cas. 4016; *U. S.* v. *Watts*, (1882) 8 Sawy. 370.

dition. But the fact that a crime charged is not within the treaty, under the rule as to the limitations of the commissioner's jurisdiction already stated, obviously runs to the question of jurisdiction, and this would seem to apply to the political offense, because specifically excluded, as well as to some other offense because not specifically included.

Again it is believed to be well established that the question whether or not the circumstances set forth in the complaint constitute the crime charged therein, within the meaning of the language of the treaty, is a question running to the jurisdiction of the commissioner and not to the merits. This statement is based upon the proposition that although upon habeas corpus a court reviews only those questions which affect the jurisdiction of the commissioner and the question whether or not he had legal evidence before him upon which to base his decision,[5] yet the courts, acting under this rule, do determine upon habeas corpus whether or not the offense charged and made out by the evidence is within the terms of the treaty.[6] This principle has been repeatedly applied by the courts where, upon writs of habeas corpus and certiorari, they have determined whether or not the facts set forth in the complaint and in the accompanying depositions, constituted embezzlement,[7] assault with intent to commit murder,[8] or forgery.[9]

It would seem, therefore, that the question as to whether or not the act charged was a crime covered by the treaty, which, it would appear, is the question to be determined whenever the defense of a political offense is raised, is, under the principles governing the cases, like the determination of the question whether or not the acts charged constitute the precise crime charged in the complaint, and therefore that a plea raising this issue runs to the jurisdiction and not to the merits.

[5] *In re Stupp*, (1875), 12 Blatchf. 501; *Ornelas* v. *Ruiz*, (1895), 161 U. S. 502.

[6] *In re Cortes*, (1889), 136 U. S. 330; *In re Reiner*, (1903), 122 Fed. 109; *U. S.* v. *Piaza*, (1904), 133 Fed. 998.

[7] *In re Frank*, (1901), 107 Fed. 272; *In re Grin*, (1901), 112 Fed. 790; *Grin* v. *Shine*, (1902), 187 U. S. 181; *In re Reiner*, (1903), 122 Fed. 109; *Ex parte Ronchi*, (1908), 164 Fed. 288. See *In re Rowe*, (1896), 77 Fed. 161.

[8] *U. S.* v. *Piaza*, (1904), 133 Fed. 998.

[9] *In re Benson*, (1888), 34 Fed. 649; *Benson* v. *McMahon*, (1887), 127 U. S. 457; *In re Adutt*, (1893), 55 Fed. 376.

The question should not be dismissed, however, without considering the language of the treaties, though unfortunately but little can be gained therefrom owing to the loose and, at times, inartistic wording of the provisions. The treaties read variously, as follows: that nothing therein "shall be construed to extend to crimes of a political character;"[10] that they "shall not apply to (crimes) of a political character;"[11] that they "shall not be applicable to persons guilty of any political crime or offense or of one connected with such crime or offense;"[12] that the provisions of the treaty "shall not be applied * * * to any crime or offense of a purely political character;"[13] that the treaty "shall not be applied, in any manner, * * * to any crime or offense of a political character;"[14] that they "shall not apply to any crime or offense of a political character or to acts connected with such crimes of offenses;"[15] that "the provisions of this convention shall not import claim of extradition for any crime or offense of a political character nor for acts connected with such crimes or offenses;"[16] that "extradition will not be granted" for political crimes;[17] and that "extradition shall not take place" where the crime or offense charged shall be of a purely political character.[18]

As will be noted from these extracts, the expression most generally used, is that the treaty "shall not apply" to crimes of a political nature, — an expression which would appear equivalent to a specific exclusion of political offenses from the operation of treaties, thus supporting the assumption already made above.

In the light of these various considerations it would appear not

[10] Baden, *Extradition Convention*, 1857.

[11] Haiti, *Treaty of Amity, etc.*, 1864; Italy, *Extradition Convention*, 1868.

[12] Belgium, *Extradition Convention*, 1901; Guatemala, *Extradition Treaty*, 1903; Luxemburg, *Extradition Convention*, 1883; Nicaragua, *Extradition Convention*, 1907; San Marino, *Extradition Treaty*, 1908.

[13] France, *Extradition Convention*, 1843.

[14] Austria-Hungary, *Extradition Convention*, 1856.

[15] Netherlands, *Extradition Convention*, 1887; Ottoman Empire, *Extradition Treaty*, 1874; Haiti, *Extradition Treaty*, 1905; Salvador, *Extradition Treaty*, 1876.

[16] Spain, *Extradition Treaty*, 1908; Portugal, *Extradition Treaty*, 1908.

[17] Argentine, *Extradition Treaty*, 1896; Brazil, *Extradition Convention*, 1898; See Switzerland, *Extradition Treaty*, 1900.

[18] Mexico, *Extradition Treaty*, 1899.

unreasonable to regard the plea that the crime charged is a political act as a plea not to the merits but to the jurisdiction.

(c) A third phase of this branch of the discussion relates to the burden of proof and the amount of evidence necessary, under the plea that the act charged is political.

As a preliminary matter to a discussion of this point, it should be said that the proceedings before the extradition commissioner are not in any proper sense of the term a trial of the accused upon the charge preferred.[19] The extent to which this principle has been carried is suggested by the fact that at one time it was ruled that the defendant might not at the hearing be a witness in his own behalf,[20] though the courts have since refused to regard this as a correct principle and now uniformly permit the accused to testify in his own behalf.[21] However, acting upon the same general principle the courts still refuse to permit the fugitive to offer in evidence the depositions of witnesses in his behalf,[22] although, under express statutory authority, such is the kind of evidence upon which he may be committed for surrender. By a further application of the principle the courts refuse to grant the fugitive any considerable privilege in the matter of continuances [23] although very lenient in this regard with the demanding government.[24] These rulings are all to be justified upon the principle that in his appearance before the commissioner the fugitive is in no sense on trial, but that he is merely

[19] *Ex parte Van Aernam*, (1854), 3 Blatchf. 160; *In re Wadge*, (1883), 15 Fed. 864; *Benson* v. *McMahon*, (1887), 127 U. S. 457; *In re Macdonnell*, (1873), 11 Blatchf. 170.

[20] *In re Dugan*, (1874), 2 Low. 367.

[21] *In re Farez*, (1870), 7 Blatchf. 345. See *In re Kelly*, (1885), 25 Fed. 268; Act of 1882, 22 U. S. Statutes at Large, 215.

[22] *In re Wadge*, (1883), 15 Fed. 864; *In re Luis Oteira y Cortes*, (1889), 136 U. S. 330, 336.

[23] *In re Wadge*, (1883), 15 Fed. 864; and see cases cited under note 24 below.

[24] *In re Calder*, (1853), 6 Op. Atty.-Gen. 91; *In re Farez*, (1870), 7 Blatchf. 345; *In re Macdonnell*, (1873), 11 Blatchf. 79, 100; *Rice* v. *Ames*, (1900), 180 U. S. 371, 376; and see generally on the question of continuances, *In re Heinrich*, (1867), 5 Blatchf. 414; *In re Ludwig*, (1887), 32 Fed. 774; *In re Wadge*, (1883), 16 Fed. 332, s. c., 15 Fed. 864; *Plugge* and *Barton*, (1889), 1 Moore on Extradition, sec. 273, and *In re Thomas Barton*, (1889), *op. cit.*

undergoing a preliminary examination for the purpose of determining whether or not he shall be placed upon trial.

Again, the treaties provide for the surrender of a fugitive upon the presentation of such evidence against him as would justify his apprehension and commitment for trial if the crime had been committed within the jurisdiction in which he has taken refuge. The statutory provisions governing this matter are framed in harmony with this idea. Manifestly under such provisions the action of the magistrate in committing for surrender may be assimilated to the bringing of an indictment by a grand jury and so the proceedings before the magistrate might in the main have reasonably been regarded as governed by the same principles that control the grand jury in matters relating to the nature and amount of evidence necessary in such cases. But the courts have not taken this view, and the general principle of the grand jury procedure has been much modified. Indeed in some of the early cases the courts went so far as to hold that the amount of evidence which the demanding government must offer, must be such as would warrant the conviction of the accused if he were actually on trial in this country.[25] But later, the courts, perceiving that in applying such a rule they not only put upon a demanding government a burden which usually could not be successfully met and that therefore they were defeating the very purposes of extradition treaties, but perceiving also that they were invoking a principle which was contrary to the express provisions of the treaties themselves, repudiated this doctrine, and now uniformly hold that it is only necessary for the demanding government to show probable cause to believe the fugitive guilty of the crime charged in order to be entitled to his surrender. The meaning of probable cause in this connection has been defined by Judge Morrow to be "such evidence of guilt as would furnish good reason in a cautious man, and warrant him in the belief, that the person accused is guilty of the offense with which he is charged," [26] and this view of the

[25] *In re Heinrich*, (1867), 5 Blatchf. 414, following and relying upon *In re Kaine*, (1853), 3 Blatchf. 1; *In re Risch*, (1888), 36 Fed. 546.

[26] *In re Ezeta*, (1894), 62 Fed. 972. See *In re Farez*, (1870), 7 Blatchf. 345; *Benson* v. *McMahon*, (1887), 127 U. S. 457; *In re Neely*, (1900), 103 Fed. 631.

law was expressly approved by the Supreme Court in *Ornelas* v. *Ruiz*.[27]

It seems sufficiently apparent from these observations that the burden of proof, — that is, the burden of establishing all necessary allegations — rests *as to the merits* upon the demanding government, which must make out a *prima facie* case against the accused. However, inasmuch as under the principle just stated, the proceeding before the commissioner is not a trial, but is a mere preliminary examination to determine whether or not the accused shall be surrendered to be placed upon trial, it is not necessary for the demanding government to establish the guilt of the accused and the burden placed upon the government is satisfied when it has shown that there is probable cause to believe that an extraditable crime has been committed and that the accused has committed it. Considered with reference to the proceedings before a grand jury, in which the suspected party has no right either to appear personally or by attorney or to offer evidence, the privileges accorded a fugitive in extradition cases appear not only to extend to him every constitutional right, but to be in reality most liberal.

However, where the defense offered to extradition runs not to the question of the guilt or innocence of the accused (which under any view must be left for decision to the tribunal before which the fugitive is to be tried), but on the contrary goes to the matter of the right or jurisdiction of the commissioner to pass upon the question of the surrender of the accused for his trial, the general principles as above set forth, while of much significance, can not be regarded as wholly controlling; since, obviously, in most cases a defense running to the jurisdiction of the committing magistrate would not, even if it could be offered upon the trial, be a defense to the merits. This seems clearly apparent in the case of the jurisdictional question regarding the political nature of the crime, because for a fugitive to admit upon trial, as he does in such cases at the hearing before the commissioner, that he committed the crime complained of and that he did so for the purpose of overthrowing an existing government would in many instances be to plead guilty, not only to the

[27] *Ornelas* v. *Ruiz*, (1895), 161 U. S. 502, 512.

crime charged, but to the crime of treason also. It would seem therefore that as to this plea of political offense as well as to all other pleas to the jurisdiction, there should be given to the fugitive opportunity, much beyond that which he is accorded upon matters running to the merits, fully to present to the committing magistrate his matters of defense.

In the case of political offenders the defense to be offered would, of course, be very simple in cases, for instance, such as those of the English regicides; but usually the problem is much more complex, since not infrequently the case that could be presented by the demanding government would bear on its face no indication that the crimes charged arose out of or were in any way connected with political movements or uprisings. In such cases the problem is difficult indeed, and it is in connection with such cases that the question of the burden of proof, in the sense of the burden of establishing the political or nonpolitical nature of the crime, becomes fundamental.

This question may be appropriately considered, *first,* with reference to the general rules of practice that govern in matters of pleas running to the jurisdiction; and *secondly,* with reference to the rules that may be deduced from the language of the treaties.

First, concerning the general rules of practice. It would seem, under the rules governing procedure before our courts, state and federal, that when the demanding government sets forth in its complaint, supported by proper affidavits, facts which *prima facie* show a case under the jurisdiction of the commissioner as that jurisdiction is defined by statute and by treaty, that it has shown as to the jurisdiction all that is necessary to entitle it to the surrender of the fugitive for trial. The government has up to that point established its case. If now, there are facts or circumstances *dehors* the record as thus presented by the government which would defeat that jurisdiction so made out, it is obviously necessary that they should be brought to the attention of the commissioner, by the fugitive who would take advantage of them. Moreover, in presenting them to the commissioner the fugitive would of necessity aver their truthfulness and assert their sufficiency. It appears to be funda-

mental in the law of pleading as applied to pleas running to the jurisdiction that he who avers a fact as true has the burden of establishing it, and if he fails to establish it, the pleading in support of which the fact is cited, fails also. If therefore the fugitive fails in establishing the facts averred in support of his plea that the crime with which he is charged is political, his plea must fail, and the commissioner must then take jurisdiction and go forward upon the merits. In this connection it must be again suggested (since the fact is often overlooked or forgotten) that the commissioner takes jurisdiction to pass not upon the guilt or inncence of the accused, but merely upon the question whether or not the accused shall be placed upon trial for the crime charged. It seems clear, therefore, that while in this plea to the jurisdiction the burden of going forward with the evidence may in the course of the hearing shift from the fugitive to the demanding government, the burden of establishing the plea will always rest where it first lies, upon the party making the positive averment that the crime is political.[28] This would

[28] In the course of the discussion upon this phase of the subject, a question was raised at the meeting as to whether or not under the general rules of practice, the proposition that the burden of establishing the want of jurisdiction was upon the one pleading it, was sound. The following note collects cases of interest in connection with this question:

In *Gould's Pleadings* it is stated, p. 22 (fifth edition), that "as to the *mode of pleading* to the jurisdiction there is an essential difference to be observed, between a plea to the jurisdiction, in a court of *limited*, and one of *general* jurisdiction: in a court of the former class it is sufficient to plead *negatively* — i. e., to show, by proper allegations, that the court has *not* jurisdiction: whereas in a *superior* court it is necessary, both at law, and in equity, — and as well in in criminal as in civil cases, not only to show that the court has *not* jurisdiction; but also to point out specially some *other court* which has it." [Citing and relying upon *Crispe* v. *Viroll*, Yelv. 13; *Earl of Derby* v. *Duke of Athol*, 1 Ves. 202; *Bishop of Sodor* v. *Earl of Derby*, *Earl of Derby* v. *Duke of Athol*, 2 Ves. 337; *Doe ex dimiss. Rust* v. *Roe*, 2 Burr. 1046; *The King* v. *Johnson*, 6 East 583; *Mostyn* v. *Fabrigas*, 1 Cowp. 161; *Rea* v. *Hayden*, 3 Mass. 23.] And see Sec. I, *Chitty's Criminal Law*, p. 437, citing authorities; *Chitty on Pleading*, p. 456*.

The rule at common law seems to be as stated by Gould.

The rule under our federal procedure is stated by Bates, *Federal Equity Procedure*, § 252, Burden of Proof upon the Issue of Jurisdiction, as follows:

"When the plaintiff in his bill avers the jurisdictional facts in conformity to the constitution and laws of the United States, the jurisdiction must be taken as *prima facie* existing; and if the defendant desires to object to the jurisdiction,

appear to dispose of the seemingly erroneous contention which is sometimes made in political refugee cases, that the fugitive has merely to raise a doubt as to the jurisdiction, whereupon the burden of establishing jurisdiction is placed upon the demanding government.

Secondly, the rule as it may be deduced from the treaty provisions. It should be observed in connection with this phase of the discussion that undue importance must not be placed upon the mere language of the treaties, for it is a thoroughly established doctrine of our courts that extradition treaties are to be interpreted broadly and liberally,

the burden is upon him to both allege and prove the facts which are relied upon to defeat the jurisdiction [citing *Sheppard* v. *Graves*, 14 How. 505, 517; *Foster* v. *Cleveland, C., C. and St. L. Ry. Co.*, 56 Fed. 434; *National Masonic Acc. Ass'n* v. *Sparks*, 83 Fed. 225]; and, under the Act of 1875, the defendant must show by proof to 'a legal certainty' that the suit does not really and substantially involve a dispute or controversy within the jurisdiction of the court." [Citing *Barry* v. *Edmunds*, 116 U. S. 550, 556; *Deputron* v. *Young*, 134 U. S. 241; *Wetmore* v. *Rymer*, 168 U. S. 115, 128. In the last case the court said: "Applying the law as heretofore stated by this court, in the cases cited, that a suit cannot be properly dismissed by a Circuit Court as not substantially involving a controversy within its jurisdiction, unless the facts, when made to appear on the record, create a legal certainty of that conclusion, we conclude that, in the present case, the want of jurisdiction was not made clear, and that the evidence before that court did not warrant a dismissal of the action for the want of jurisdiction."]

In *Sheppard* v. *Graves*, (1853), 14 How. 505, 510, Mr. Justice Daniel said: "With respect to the exception taken to the ruling of the District Court, as to the obligation of the defendant to prove his averment of the plaintiff's residence in the State of Texas, and not of Louisiana, as set forth in the petition, were the decision of this question deemed requisite here, we should say that the true doctrine applicable to the question is this: that although in the courts of the United States it is necessary to set forth the grounds of their cognizance as courts of limited jurisdiction, yet wherever jurisdiction shall be averred in the pleadings, in conformity with the laws creating those courts, it must be taken *prima facie* as existing, and that it is incumbent on him who would impeach that jurisdiction for causes *dehors* the pleading, to allege and prove such causes; that the necessity for the allegation and the burden of sustaining it by proof, both rest upon the party taking the exception."

In the next case following, involving the same parties and the same issues, Mr. Justice Daniel said: "The plaintiff having averred enough to show the jurisdiction of the court, and nothing having been adduced to impeach it, that jurisdiction remained as stated, and the plaintiff could lose nothing by adducing either imperfect evidence, or no evidence at all, in support of that which clearly existed, and which he, under the circumstances, could not be called on to sustain."

rather than narrowly and technically.[29] The general purpose and intent of a treaty provision as viewed from the entire object of the treaty, should be looked to in reaching an understanding concerning the meaning of the provision, rather than the mere language in which it is framed. This fundamental canon of interpretation is often lost sight of. For example, it has been vigorously contended[30] that, with reference to the tribunal before which the fugitive should plead his defense, there was a fundamental difference between the provision of the extradition treaty of 1870 with Salvador under which the question of the political nature of the crimes charged was determined in the *Ezeta* case by Judge Morrow acting as committing magistrate, and the provisions of the extradition treaty of 1887 with Russia under which, it was argued, this question could only be passed upon by the executive. And yet when the whole of the

These opinions of Mr. Justice Daniel have been cited and followed in a number of cases. See *Foster et al.* v. *Cleveland, etc., Ry. Co.*, (1893), 56 Fed. 434; *Adams* v. *Shirk*, (1902), 117 Fed. 801; *Yocum* v. *Parker*, (1904), 130 Fed. 770; *Hunt* v. *N. Y. Cotton Exchange*, (1906), 205 U. S. 322; and see the dissenting opinion of Judge Knowles in *Hewitt* v. *Story*, (1894), 64 Fed. 510, 523.

In *Foster et al.* v. *Cleveland, etc., Ry. Co., supra*, the court said: "Before the Act of 1872 (Rev. St., § 914), beyond doubt, where jurisdiction of the courts of the United States was alleged, the burden, both of allegation and proof, rested upon whomsoever would defeat it. *Sheppard* v. *Graves*, 144 How. 505. By the laws of New York, Ohio, and some other states, adopted by this statute, such allegations must be made in the answer. *Draper* v. *Springport*, 15 Fed. Rep. 328; *Refining Co.* v. *Wyman*, 38 Fed. Rep. 574. If these statutes changed the form, mode, and time of such pleadings, they did not obviate the necessity, nor alter the burden, of proof. *Hartog* v. *Memory*, 116 U. S. 588, 6 Sup. Ct. Rep. 521; *Refining Co.* v. *Wyman*, 38 Fed. Rep. 574."

In the recent case of *Hunt* v. *N. Y. Cotton Exchange, supra*, Mr. Justice McKenna speaking for an undivided court, commented upon this principle as follows: "On the issue presented by the plea [to the jurisdiction] the burden of proof was upon the appellant [the defendant], and he was required to establish by a preponderance of the evidence that the amount involved was less than the jurisdictional amount. *Sheppard* v. *Graves*, 14 How. 504; *Wetmore* v. *Rymer*, 169 U. S. 115; *Gage* v. *Pumpelly*, 108 U. S. 164; *Adams* v. *Shirk*, 117 Fed. Rep. 801."

[29] *Benson* v. *McMahon*, (1887), 127 U. S. 457; *Grin* v. *Shine*, (1902), 187 U. S. 181; *In re Herres*, (1887), 33 Fed. 165; *In re Neeley*, (1900), 103 Fed. 626; *In re Grin*, (1901) 112 Fed. 790.

[30] See record in *Rudovitz* case, 1908, Commissioner Foote, Chicago.

treaties and their provisions are looked to, it may well be doubted that any such difference on this point was ever intended or contemplated by those negotiating the treaties.[31]

With this general principle of broad and liberal interpretation in mind, the following observations may be made upon the language of the treaties, with, however, one further preparatory remark, — that the general purpose of the political clause in extradition treaties appears to be to provide against the surrender of political refugees for punishment for political crimes.

A considerable number of our extradition treaties[32] contain no provisions that might be fairly construed as suggesting any rule at all regarding the burden of proof in establishing the political or non-political nature of the crime charged, and the question in extradition under these treaties must be left for determination in accordance with the general rules governing pleas to the jurisdiction. In these treaties it is merely specified that the provisions shall not be applied or that they shall not be applicable to crimes or offenses of a political character.

The language of others of the treaties[33] seems, however, to contain a direct intimation, if not indeed an express provision upon the question. These treaties, of which the Russian treaty is a type, pro-

[31] The language of the treaties is as follows: "The provisions of this treaty shall not apply to any crime or offense of a political character." — Salvador, *Extradition Treaty*, 1870; "If it be made to appear that extradition is sought with a view to try to punish the person demanded for an offense of a political character, surrender shall not take place." — Russia, *Extradition Convention*, 1887.

[32] France, *Extradition of fugitives from justice*, November 9, 1843; Austria-Hungary, *Extradition*, July 3, 1856; Haiti, *Amity, commerce and navigation, and the extradition of criminals*, November 3, 1864; Turkey, *Extradition*, August 11, 1874; Baden, *Mutual surrender of criminals*, January 30, 1857; Ecuador, *Extradition*, June 28, 1872; Netherlands, *Extradition of criminals*, June 2, 1887; Belgium, *Mutual extradition of fugitives from justice*, October 26, 1901; Guatemala, *Mutual extradition of fugitives from justice*, February 27, 1903; Luxemburg, *Extradition of criminals*, October 29, 1883; Haiti, *Mutual extradition of criminals*, August 9, 1904; Nicaragua, *Extradition of criminals*, March 1, 1905; San Marino, *Extradition*, January 10, 1906.

[33] Japan, *Extradition of criminals*, April 29, 1886; Russia, *Extradition of criminals*, March 16/28, 1887; Colombia, *Extradition of criminals*, May 7, 1888; and see treaties collected in the next note.

vide that "if it shall be made to appear" that the crime charged is political, surrender shall not take place. It would seem too clear to call for argument that inasmuch as the interest of the demanding government is that the crime should seem an ordinary one, the burden is upon the fugitive in whose interest the provision is made to make it "appear" that the offense charged is otherwise. The only reasonable ground for argument in the matter would seem to lie in the meaning of the term "appear," whether the term means merely that the fugitive must only suggest a doubt and then have the burden of establishing that it is not a political crime thrust upon the demanding government in order to overcome this "appearance" that the crime is political, or whether it means that the fugitive must show, demonstrate, prove, that the offense is political in order to avoid a surrender. The language considered broadly seems to be clear upon the point for it is affirmative in its form and provides that in order to defeat extradition it must "appear" that a crime is political and not that, in order to be entitled to surrender, it must be shown that the crime is not political.

Certain treaties contain a further provision which would seem to make this conclusion certain. The provision now referred to specifies in addition to the stipulation just discussed, that surrender shall not take place if the fugitive "*prove*" that it is the intention of the demanding government to try him for a political offense after his return, even though he is extradited for a nonpolitical offense.[34] There can be little question but that this provision clearly contemplates that the burden of establishing this defense (which would seem to run to the jurisdiction) should be placed upon the fugitive. Moreover, it is not improbable that the negotiators intended that the

[34] Norway, *Extradition of criminals*, June 7, 1893; Denmark, *Extradition of fugitives from justice*, January 6, 1902; Peru, *Extradition of criminals*, November 28, 1899; Servia, *Mutual extradition of fugitives from justice*, October 25, 1901; Sweden, *Extradition of criminals*, January 14, 1893; Panama, *Mutual extradition of criminals*, May 25, 1904; Brazil, *Extradition of criminals*, May 14, 1897, and May 28, 1898; Bolivia, *Extradition of fugitives from justice*, April 21, 1900; Chile, *Extradition of criminals*, April 17, 1900; Great Britain, *Extradition convention*, July 12, 1889; Denmark, *Extradition of fugitives from justice*, January 6, 1902; Cuba, *Mutual extradition of fugitives from justice*, April 6, 1904.

expression "if it shall be made to appear" in the earlier part of the provision, should be equivalent to the term "prove" in the later clause, and this assumption seems the better founded when it is considered that otherwise the treaty would relieve the fugitive from proving that the crime charged was connected with a political movement, comparatively an easy matter, and impose upon him the burden of establishing an *intent* of a demanding government to try him for a political crime, upon his return to that country, — an almost impossible task. Such a distinction would seem not only arbitrary, but unfair. It is believed that the two phrases are equivalent, that they impose upon the fugitive the burden of establishing the defense to the jurisdiction, and that these provisions are but the specific expressions of the general intent and meaning of similar provisions in other extradition conventions.

One point further is worthy of notice in this connection. It is well established that extradition proceedings instituted by a demanding government are presumed to be made in good faith, and as a general rule the courts will refuse to consider the question of the bona fides of the demand.[35] It would seem that this presumption must also obtain where the fugitive raises the defense of the political nature of the crime and this would appear true even though the treaty provisions expressly provide that the nature of the crime may in this case be examined. If this is correct, then the fugitive would clearly be under the necessity of overcoming this presumption which the courts are always slow to question.

These considerations would seem to establish that the fugitive, in order to be entitled to his discharge from custody, must do more than merely raise a doubt as to the political character of the offense; but the question as to whether or not he should establish his defense beyond a reasonable doubt or merely by a preponderance of evidence may perhaps be considered as open. However, in view of the fact that in cases such as these the decision of the commissioner would as a practical matter be almost equivalent to a verdict of guilty (since, the fugitive admitting his guilt, surrender to the demand-

[35] *In re Kaine*, (1852), 14 How. 103, 145; *In re Heilbronn*, (1854), 11 Fed. Cas. 6,323; see also to the same point *In re Arton*, [1896], L. R. 1 Q. B. 108.

ing government would doubtless mean a conviction), it is believed that the rule should not require the fugitive to establish his defense beyond a reasonable doubt, but that it should provide that his discharge is due when he has a preponderance of the evidence in his favor. This seems to be the general rule governing pleas running to the jurisdiction.

If the conclusions above set forth upon this branch of our discussion are sound, it would appear (1) that the plea that the crimes or offenses charged are political in their nature, is a plea to the jurisdiction and not to the merits; (2) that the fugitive pleading to the jurisdiction has the burden of establishing it by a preponderance of evidence; (3) and that the commissioner's findings upon this question are subject to review by the courts under writs of *certiorari* and *habeas corpus.*

II. *The second branch of the subject as outlined deals with the question of the tribunal before which the defense of the political character of the act should be pleaded.*

The point has been made in some recent cases that a determination of the question of the political character of an offense charged is for the executive alone, and that it was not settled otherwise in the *Ezeta* case,[36] where Judge Morrow, acting as a committing magistrate, determined that the offenses against the prisoners in that proceeding were political in their nature and, therefore, were not such as would warrant the surrender of those accused to the demanding government.

It is believed, however, that those who assert this doctrine confuse the matter somewhat by considering that it involves a question regarding the political status of the movement in connection with which the offenses charged are committed. While this doctrine finds some confirmation in the language of some of the courts and particularly the discussions of Mr. Justice Nelson in the Kaine case,[37] the cases as a whole suggest that this position is not well taken in point of law, for in a majority of the very few cases which have called

[36] *In re Ezeta,* (1894), 62 Fed. 972.
[37] *Ex parte Kaine,* (1853), 3 Blatchf. 1.

for the consideration and determination of this question by our authorities, no question whatsoever has arisen concerning belligerency and, therefore, the question of an official executive recognition of the political status of a revolution, so-styled, has not been presented. The simple question that has called for determination in the determined cases seems to have been rather a mere question of fact, — whether or not at the time the occurrence took place there was an actual revolutionary movement in the country from which the accused was fugitive, and if so, whether or not the act complained of was a part of such movement; and by analogy it would seem that this should be determined as are other facts, by the commissioner. Indeed, it might perhaps be urged that for the executive to determine this fact would in some instances afford opportunity for embarrassment since it might be sought to construe an affirmative determination as indicating a disposition upon the part of the government to sympathize with, if not tacitly approve of, an effort to overthrow the government of a country with which this government enjoyed at the time the most friendly relations, and with which it was at peace. It is of interest to note that committing magistrates generally have followed Judge Morrow, and have determined this question as they have determined other points upon which the fugitive sought to defeat surrender. This was the rule followed in the somewhat notorious *Lynchehaun* case and in the more recent *Pouren* case.

It is believed that a consideration of the respective powers and duties of the commissioner and executive supports this view. It has been already pointed out that in extradition matters the powers possessed by the commissioner and by the Secretary of State are those only which have been expressly conferred by statute or which rise out of the provisions of our treaties with foreign governments.[38] Now, under the statutes and the treaties, the only person having the power to commit the fugitive for surrender to the foreign government is the committing magistrate; for while the Secretary of State may refuse to surrender after commitment, he has no authority what-

[38] *In re Vandervelpen*, (1877), 14 Blatchf. 139.

soever to commit. But it has been shown above that the plea that the offense charged is political, is a defense which goes to the right or jurisdiction of the commissioner to commit for surrender. It would seem therefore to follow that if a fugitive in a given case considers that the commissioner has no authority to commit him for surrender to a foreign government for punishment, the logical course would be for him to offer such facts as he may have to establish this defense, before the tribunal to the jurisdiction of which he objects. This conclusion is not at all disturbed by the fact that the Secretary of State may and must ultimately pass upon the defense offered, because he reviews in like manner the merits, and yet it would scarcely be contended that this makes him the only proper party to pass upon the merits in the first instance. This view — that the Secretary of State does not and, indeed, can not pass upon this matter in the first instance — finds confirmation in the practice long ago adopted by the Department of State, of refusing to consider, in determining whether or not a warrant of surrender shall issue, any evidence which has not been made part of the record made up by the commissioner, — a rule which has been applied both as to evidence offered by the demanding government and as to evidence offered by the fugitive.[39]

Under these considerations, it would seem a necessary conclusion that such evidence as the fugitive may have tending to establish that the crime for which he is demanded is in reality a political offense should be offered to the committing magistrate. As a practical matter, it may be said that so long as the present practice is maintained in the Department of State, no fugitive would be quite safe in neglecting or refusing to present before the commissioner his defense that the crime with which he is charged is political.

III. *Is the political nature of the act finally passed upon and determined by the courts or by the executive?*

As is well known, the functions of the Secretary of State in extradition matters have been but imperfectly determined. The statute provides that if upon the hearing the commissioner

[39] Moore on Extradition, §§ 374–376; The *Pouren Case.*

deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such demanding government, for the surrender of such person, according to the stipulations of the treaty or convention.[40]

It was for some time held under this statute that the functions of the executive, exercised through the Secretary of State, were merely ministerial and that the latter had no power to pass upon the propriety of the surrender,[41] his action being confined to the issuance of the warrant of surrender. But that view has been abandoned, and it is now well established that not only may the Secretary of State pass upon the merits of the case but, inasmuch as he is the only person or tribunal by whom the finding of the commissioner upon the merits can be reviewed, it is his duty so to do.[42] In accordance with this view the Secretary of State claims and exercises the right to pass upon the weight of the evidence submitted before the magistrate and upon all other matters which are not pure questions of procedure, which are determined upon writs of *habeas corpus* and *certiorari,* and issues his warrant of surrender or refuses to issue it and secures the discharge of the prisoner, as upon examination he feels under the circumstances is proper and just.

But if the defense that the crime charged is political runs (as seems probable) to the jurisdiction of the commissioner, it would appear to follow that the determination of the commissioner upon the point would, upon *habeas corpus,* be open to examination by the judicial branch of the government, since one of the best established principles of extradition is that questions relating to the jurisdiction of the commissioner are reviewable by the courts upon *habeas corpus.*[43] It would seem possible, under this view, for an alleged political prisoner in a given case to test the validity of his commitment in the Supreme Court itself. It ought however to be remarked

[40] R. S., § 5270.
[41] Moore on Extradition, § 361.
[42] Moore on Extradition, §§ 364 *et seq.*
[43] *In re Stupp,* (1875), 12 Blatchf. 501.

that the attitude of that tribunal in *Ornelas* v. *Ruiz* can not be regarded as wholly in harmony with this suggestion, though, as the court expressly declined to pass upon it, the question may be regarded as still open.[44]

But according to the circumstances of a given case either the executive or the court may in that case finally determine the question. If, for instance, it should be considered that the political character of the offense is a plea going to the jurisdiction and if, having been committed for surrender, the fugitive should contest the decision of the commissioner up through the courts and should have his petition adversely ruled upon by all, even the Supreme Court itself, yet inasmuch as the issuing of the warrant of surrender is wholly discretionary with the Secretary of State, that officer might, if he should reach a different conclusion regarding the political character of the offense, refuse to issue the warrant of surrender and have the marshal directed by the President to discharge the prisoner. In such a case, of course, the ruling of the Secretary of State would be final.

But, on the other hand, should the committing magistrate rule that the offense was not political and should the Secretary of State, upon the record being transmitted to him, concur in the finding of the commissioner and issue the warrant of surrender, still it would be possible for the prisoner to sue out a writ of *habeas corpus* and secure his release, should he be able to persuade some judge that the crime with which he was charged was political and not within the terms of the treaty.[45]

These illustrations develop the fundamental fact that under normal conditions it is not possible in any case to deliver up to a demanding government a fugitive from the justice of that government unless the action is concurred in both by the judicial and executive branches of this government. If either of these consider that the fugitive should not return, it is impossible for the demanding government to obtain him through extradition process.

As suggested, this is the normal condition. It should be observed,

[44] *Ornelas* v. *Ruiz*, (1895), 161 U. S. 502.

[45] *Ex parte Kaine*, (1853), 3 Blatchf. 1; *In re Macdonnell*, (1873), 11 Blatchf. 170.

however, that there are a number of treaties containing provisions regarding this matter which may perhaps require that as to them this doctrine shall be changed, though so far as known none of them have yet been the subject of interpretation by either the courts or the executive. The provisions are not uniform and in some of them the language is loose and ambiguous. In one of them, for example (the treaty with Argentine), it is provided that in cases of doubt regarding the political character of the act, the " decision of the *judicial* authorities of the country to which the demand for extradition is directed will be final." It perhaps is a fair question for debate whether or not in a case arising under this treaty the Secretary of State would have any choice except to follow the findings of the courts where the courts have determined that the offense with which the fugitive was charged is not political in its character. Such a rule would of course deprive him of the check which under normal conditions he exercises over the courts and, contrary to the usual practice, would put the determination of the question regarding political offenders into the hands of the judiciary only. But the meaning of this clause has yet to be determined.

The provision as found in other treaties is framed differently from this, and while the language of such treaties varies somewhat in particular treaties, it seems to incorporate the same essential idea.[46] The provision most frequently found reads as follows:

> If any question shall arise as to whether a case comes within the provisions of this article, the decision of the authorities of the government on which the demand is made or which may have granted the extradition shall be final.

One of the most interesting phases of this particular question arises from the fact that the treaties usually provide that a fugitive shall not be tried in the country to which he is returned for any political act committed prior to his return. Under the normal conditions, the question as to whether or not that provision of the treaty was

[46] Chile, *Extradition treaty*, 1900; Cuba, *Extradition treaty*, 1905; Denmark, *Extradition treaty*, 1902; Panama, *Extradition treaty*, 1905; Peru, *Extradition treaty*, 1899; Servia, *Extradition treaty*, 1901; Sweden and Norway, *Extradition of criminals*, 1893; and see Great Britain, *Extradition convention*, 1889.

being violated could hardly be brought directly to the attention of this government, and if it were, it would seem that the action of this government must consist either in a denouncement of the treaty by the executive for a violation of its terms, or in the making of a formal protest. The treaty would give no rights beyond this. But under the treaty provisions under consideration the rights of this government would appear to be much enlarged. If under these treaties it was brought to the attention of this government that an effort was being made to punish a surrendered fugitive for a political crime committed prior to his surrender, the authorities of this government would have the right to determine whether or not the act for which it was sought to try and punish the accused was really of the prohibited kind, and this right would seem to exist whether the act in question was the act for which the fugitive had been surrendered, or some other act. If such a case should arise under the treaty with Argentine, our courts would be charged with deciding the question. The situation that would arise in such a case, involving as it would the liberty of a person not only not before the courts, but beyond their jurisdiction, would certainly be novel and, it is thought, not without some difficulty. Under the wording of the other treaties the question would perhaps be decided by the executive. Under either plan, the procedure would it is believed be unique to our jurisprudence.

IV. *The final phase of the discussion upon this subject has reference to the elements and characteristics of political crimes and offenses as they may be deduced from the adjudged cases.*

As has been already suggested, some courts in contending that determinations regarding political offenses are to be made by the executive have reached this conclusion apparently upon the assumption that the question involved is of the same sort as that which arises upon the proposed recognition of a new state or new government. Mr. Justice Nelson has expressed this idea in the following words:

In most cases, perhaps, of political offenses, the acts, detached from the political character of the transaction, would bring the case within some of the offenses enumerated, and, unless the government

upon whom the demand is made takes the responsibility of distinguishing between the two, the treaty obligation would require the surrender. The surrender, in such cases, involves a political question, which must be decided by the political, and not by the judicial, powers of the government. It is a general principle, as it regards political questions concerning foreign governments, that the judiciary follows the determination of the political power, which has charge of its foreign relations, and is, therefore, presumed to best understand what is fit and proper for the interest and honor of the country. They are questions unfit for the arbitrament of the judiciary — especially so for the subordinate magistrates of the country.[47]

But I venture to suggest that this view is erroneous. If, as has been already suggested, the determination of the question of the political character of the offenses charged against the fugitive was in any way, even in the slightest, determinative of the political status of the revolutionary party to which he belonged, if it could be construed as a recognition of the belligerency of the party of which the fugitive was a member, the considerations so vigorously urged by Mr. Justice Nelson would be of considerable weight. But such is not the fact. On the contrary, in almost all of the cases of political offenders who have sought refuge in this country and whose surrender has been denied by this government upon extradition proceedings instituted by the government from which they came, there has been no recognition whatsoever of the belligerency of the party to which the fugitive belonged. This is true of the Mexican revolutionists of the 90's, as well as of the recent revolutionary fugitives from Russia. In these cases, therefore, the real question at issue was whether or not, as a historical fact, there existed in the demanding country a revolutionary movement in the general rather than in the technical meaning of that term; if so, whether or not the fugitive was a member of one of the parties; and if he was, whether or not the crime with which he was charged was committed in the course and as a part of the political activities of that party to which he belonged. It is not, in such cases, necessary that there be such a condition of revolution or rebellion as entitles the revolutionary or rebel party to be recognized as belligerent, and this being true, it would appear that

[47] *Ex parte Kaine*, (1853), 3 Blatchf. 1, 8.

the considerations urged by Mr. Justice Nelson could not be regarded as controlling.

Moreover, it would appear from the cases that it is not necessary that the uprising, if it actually exists, should be of any considerable extent or that it give particular promise of being successful. This seems to be established by the case of *Guerra,* in which, if the transactions in which Guerra took part be divorced from the attending circumstances, the expedition in which he was engaged resembles raids of a marauding band rather than an armed expedition of a warlike party, and this same observation applies with equal force to the activities of *Cazo,* the defendant in an earlier case.

Again, it does not appear necessary that the act should be connected with any armed expedition. The recent cases of the Russian revolutionists *Pouren* and *Rudovitz,* in which these persons appear to have been members of a mere armed posse directed to carry out the decrees of a civil rather than a military organization, are to this point.

It would also appear from these Russian cases that the party to which the fugitive belongs need not, in order to be considered revolutionary, be warlike, that is, it need not at the moment have an armed force in the field or be engaged in military operations.

And it would seem, further, that such a party need not have control of any of the actual governmental machinery even in the district in which the acts complained of occurred. It would appear to be sufficient if it were an actual party, its operations as well as its organization being secret. It should, however, be noted that in the Russian cases it appeared that although the Russian government was in actual control of the governmental offices of the revolutionary provinces, the revolutionists maintained among themselves a more or less effective organization and attempted, at least, to govern the members of their own party and to punish those inimical to it.

Another point which appears to have been settled by the Russian cases is that it is not necessary that the parties against whom the revolutionists operate shall be political persons, that is, they need not be members either of the civil or the military branches of the dominant party in control of the government, but may be private indi-

viduals. This goes a step beyond the principle suggested by Mr. Sherman in his note to Minister Romero regarding the *Guerra* case, in which he made a point of the fact that in that case the parties against whom *Guerra* operated were political or public persons, that is, soldiers.[48]

Another question, not yet settled, arises in connection with this branch of our subject, that is, whether all the crimes committed by members of a revolutionary party carrying out a revolutionary mandate become thereby revolutionary acts, devoid of criminality. Mr. Sherman in the correspondence already referred to, suggest that they do not. He says:

> It (the refusal to surrender) is placed upon the distinct ground that so far as *Guerra* is concerned, whatever others may have done, it does not appear from the testimony that he committed any extraditable offense and for that reason could not be delivered. The department is not prepared to say that others may not, in the same expedition, have committed offenses of the character which would warrant their extradition under the terms of the treaty.[49]

This statement seems certainly to contemplate that a party engaged in a revolutionary undertaking may in the course of such undertaking commit crimes which are not political and are, therefore, extraditable. Under this principle, the determination in particular cases of the character of any given act will doubtless always be accompanied by the greatest difficulty. It has been suggested in this connection that a distinction be taken between the motive and the object with which the act is undertaken. In other words, if the main purpose of the act is political, then the crimes which are attendant upon or incident to such an undertaking will also be political.[50] For the purpose of illustration, an analogy may be suggested between this situation and that which arises when you attempt to hold a master for the wrongs of his servants. In the latter matter it has been good law ever since Baron Parke's time that the master

[48] Moore, *Digest of International Law*, § 604.
[49] *Idem.*
[50] *Idem.*

is not liable where the servant is not on the principal's business but has gone "on a frolic of his own." It may be that some such distinction can be applied in the determination of what are political offenses, though the question will always be diffieult; and as there is always a border land in the case of the master and servant, there will doubtless be found a like region in the case of political offenders. The extent to which this principle may be extended is suggested by the recent *Rudovitz* case, in which the fugitive was charged by the Russian government with murder, arson, robbery, and larceny. So far as appeared from the evidence given at the hearing the only crime that was authorized by the revolutionary committee was the killing of the designated persons. The robbery, larceny, and arson appear not to have been authorized, and yet, from the fact that the surrender of *Rudovitz* was denied even for these crimes, it would appear that these crimes were considered as so closely connected with the act authorized, as to partake of its nature and so be non-extraditable.

These are some of the more essential elements which may be gathered from the political refugee cases which have come before our courts and before the Department of State for adjudication. But the Russian cases suggested that perhaps the further question may at some time arise as to whether or not a political act may not be carried out with such barbarity or inhumanity as to deprive the offense of immunity under the treaty. It will be recalled in this connection that Judge Hawkins stated in the Castioni case,[51]

that everybody knows that there are many acts of a political character done without reason, done against all reason; but at the same time one can not look too hard and weigh in golden scales the acts of men hot in their political excitement. We know that in heat, and in heated blood men often do things which are against and contrary to reason; but none the less an act of this description may be done for the purpose of furthering and in furtherance of a political rising, even though it is an act which may be deplored and lamented as even cruel and against all reason, by those who calmly reflect upon it after the battle is over.

[51] *In re Castioni*, (1890), 1 Q. B. Div. 149.

It would seem, however, that there must be some limit to this idea, and *quære,* whether or not the act must be no more barbarous than would be sanctioned by the modern rules of war.

Before closing the discussion of this question attention should be called to the fact that some of our treaties contain express provisions that certain offenses against the heads of governments shall not be considered as political. For example, the treaty with Belgium, with which our treaties with Cuba, Guatemala, and Luxemburg agree, provides that any act against the head of a foreign government or against the life of any member of his family when such attempt comprises murder, assassination, or poisoning, shall not be considered a political offense. The treaties with Denmark and Russia accord with this except that the expression " head of a foreign government " is changed to " head of either government," and in the treaty with Russia accessoriship to either of the crimes mentioned is included. Similar provisions are contained in the recent extradition treaties which have been negotiated with Spain and other countries. The treaty with Brazil is essentially the same and provides that

the following shall not be considered political crimes when they are unconnected with political movement, and are such as constitute murder, or wilful and illegal homicide, as provided for in Section I of the preceding article.

The treaty then specifies attempts against the life of the president or vice-president of either republic, or against the lives of the governors or lieutenant-governors of the various states comprising the two republics. It would appear that the idea behind these treaty provisions is the exclusion of anarchists from the benefit of the defense that the crime charged is a political act and in this connection it is not without interest to observe the various congressional statutes which authorize the exclusion from our shores of this class of people.

But the time allotted for this address has passed some time since, and it is necessary to bring these remarks to a close. What has been said is confessedly fragmentary and incomplete, and many of the most interesting and important phases of the subject have been but touched or suggested. Enough has, however, been said to indicate how few of the principles (even of those that are fundamental)

which control the extradition of persons claiming to be political offenders, have been determined. Experience teaches how necessary it is that these principles be sought and applied with greatest care, in order that, on the one hand, no true political refugee shall be deprived of the rights given him by treaty, and, on the other hand, that our body politic shall not be corrupted by the continued presence amongst us of large numbers of criminals who seek to avoid a just punishment for all kinds and degres of crime, on the ground that they are political offenders.

The CHAIRMAN (Mr. Davis). Judge Calhoun, of Chicago, was to have addressed us, but he was unable to come at the last moment. The discussion of this subject will be continued by Mr. Frederic R. Coudert.

ADDRESS OF MR. FREDERIC R. COUDERT, OF NEW YORK CITY.

Mr. Chairman, and Gentlemen of the Society: When my good friend, Dr. Scott, requested me to read a paper, he informed me that I should be limited to fifteen minutes. Whether he did that out of that prudence for which he is distinguished, I do not know, but I am inclined to think that his motive was different and perhaps somewhat malicious, despite his otherwise delightful and amiable nature, for I rather suspect from what has gone before that he does not feel altogether happy over the precedents which the State Department, under his wise management, has created in the last few months, and therefore does not want to give me twenty minutes, fearing that in twenty or twenty-five minutes I could completely demolish them. So I give notice that I will pay no attention whatever to the time limit, and if any persons, feeling that they are about to be subjected to cruel and unusual punishment — for I shall read the whole paper — desire to retreat, I suggest that they do so now. I would go, myself, but feel that, being upon the programme, I am under a certain obligation to remain.

In following so eminent and able a gentleman as my friend Mr. Clark, one always feels that one may do what younger Pitt charged some unfortunate members of the House of Commons with doing.

He alluded to, " The honorable gentleman who spoke after the right honorable gentleman, following in the thread of his discourse and greatly attenuating it." I shall try not to do that. In the first place, I shall not follow in the thread of the discourse, because in the brilliant and able apology for the State Department and its brilliant legal adviser, he dissented in toto from pretty much everything that I shall say. One of the most eminent members of this assembly, who was here this morning, but who was prudent enough to stay away this afternoon, remarked to me this morning that he supposed that I would have a " brief " on the subject. I did not resent the imputation, at that time, for the gentleman in his own discourse had explained to us how heretofore arbitration had been found at times a failure because he had lost some of his own cases. I could sympathize with his point of view, but I do not mean to follow wholly in his footsteps. I do not for a moment desire to intimate that I shall transport myself into the higher juristic regions into which a mere lawyer so rarely ever gets, and that I can wholly forget all fees, past, present and to come. I must live by practice, and therefore I should be hypocritical to attempt any such flight. But, in defense of what I am going to say, I may add that if I am influenced by past fees, I am also influenced by the hope of future fees, and that as I may hope to have retainers on either side of the question, I have tried to be quite as impartial as I could. This will therefore dispose, I trust, of the implication that I am making a brief of the question in this controversy. It was Jerry Black who said that every lawyer ought to try at least to give the court some light. I shall try, therefore, in a very humble way, to give my kindly hearers the best light that I can.

Certain subjects seem to recur for discussion periodically. Long intervals of quiescence, during which they provoke little or no discussion, are broken by some series of events which bring the dormant and only half-solved question again before a public, who, misconceiving all the difficulties, can not understand why lawyers and the law do not reach solutions of the problem with mathematical precision. Certain enthusiastic patriots, during the French Revolution, thought with Jack Cade that the simplest way to resolve the

intricacies of the law was to hang the lawyers, and thus allow men to live together in brotherly love under the guidance of a few general principles, which, in the absence of the legal profession, no sane citizen either could, or would, misinterpret or cavil over. Simple the proposed solution certainly was, but its efficacy may be doubted, since the abolition of the bar which was actually decreed, was not followed by any halcyon time of concord. Only for a time could street fights take the place of forensic disputation, and the speedy restoration of the "ordre des avocats" leads to the conclusion that the alternative system was not very successful.

In the domain of much mooted and periodically recurring legal controversies, the question of whether extradition should be granted for political offense, occupies a prominent place.

To the man in the street, the answer may seem easy; was not Washington a rebel once, General Lee an insurgent, and the great Kossuth a hero whose misfortunes entitled him to national sympathy, and hence should not the political refugee be accorded a ready and welcome asylum in this hospitable land? Yet even the man in the street may be made to look more leniently upon the lawyer's great weapon, the "distinction," when reminded that in the class of political offenders may also be placed objects of universal execration like Wilkes-Booth, Guiteau, Czolgolz, Fieschi, Orsini, the assassins of Carnot and the late kings of Italy and Portugal as well as the men of the Paris Commune, whose monstrosities shocked the civilized world.

The man in the street would recoil in horror should you ask him to class as equally entitled to asylum on American soil men like Lafayette or Carl Schurz and the Communists of 1870 who cruelly tortured, and killed, General Breda, an honorable and distinguished officer, who, desiring to save useless bloodshed, presented himself with a white flag as a messenger of peace. The spontaneous differentiation which the universal instinct of every civilized community would make between such cases, may not as yet correspond to any legal distinction, nor may it have been specifically formulated, but can international law long fail to recognize a sentiment at once so obvious and commanding such general acquiescence?

Within a few weeks we have seen our government refuse to extradite a man charged with the killing of three women. The American people are a chivalrous nation, and women killers, it is safe to say, will never be regarded by them with sincere admiration. The fact that the man in question, so the public prints report, has been found a vagrant in the Chicago streets, rather than been made the victim of public banquets, sufficiently disposes of the question as to the popularity of that kind of hero among the American people.

The query is: can some method be found, by which international law, keeping in touch with the moral requirements of the age, shall differentiate between those who have sought refuge here, after having honestly and fairly — although by revolutionary methods — sought to change, or modify, a governmental system, and those who, although their acts may have been inspired by political motives, have yet been guilty of acts generally reprobated by all civilized nations? The answer to this query will involve some examination into the nature of political crime and the present treaty law on the subject.

Evolution, legal as well as biological, sometimes appears to play queer antics. Political offenses, now generally excepted from the operation of extradition treaties, were, originally, the only offenses for which extradition was sought or granted. Without going back to the proclamation of the Athenians promising they would deliver up those seeking refuge on their territory who had attempted to murder Philip of Macedon, we find a very early, if not the earliest, treaty of extradition concluded in 1147, between Henry II of England and King William of Scotland, providing for the surrender of traitors and felons. In 1303 a like clause is found in a treaty between France and England. Again, we find Henry VII obtaining from Spain the rendition of the Duke of Suffolk, afterwards executed by Henry VIII, and Denmark surrendering some of the men who had put Charles I to judgment and execution.

In 1790 Spain delivered to France, Ogé, charged with insurrection in San Domingo.

As late as 1801 the Senate of the Free City of Hamburgh surrendered to the English three Irishmen charged with sedition. Upon

the latter occasion, Napoleon wrote to the Senate a letter reproaching them with having violated the laws of hospitability in a fashion which would have made the Nomad tribes of the desert blush. How far this outburst was due to love of liberty, sympathy with Ireland's woes, or merely dislike of perfidious Albion, on the part of the great man, is a question beyond the limits assigned to this paper.

The obvious reasons for extradition in cases of political offense would appear to have been the importance attached to political crime compared with ordinary crime, especially in a society which was not policed as ours is, as well as the absence of the diplomatic and judicial machinery making extradition an easy and normal proceeding.

Underlying these reasons, however, there was, I suspect, a deeper one. The political theories of the Middle Ages seem to have had little place for the right of revolution, and the generally accepted imperial theory of power from above down, left small room for sympathy with insurrection.

This, perhaps, explains why political offenses were looked upon as the most serious of all, and we find Grotius saying

statum publicum tangunt aut eximiam habent facinoris atrocitatem.

In the first quarter of the nineteenth century, we find treaties expressly providing for the surrender of those who had been engaged in treason or other acts against the state. This was so, notably in the treaty between Austria, Prussia, and Russia in 1834.

Political conditions in Europe had, however, so altered that the change in public sentiment was bound to be translated into the domain of diplomacy and law.

France was the first country to embody in law and in treaties the principle of exemption for political offense. The revolutionary origin of the July monarchy, together with the well-settled principle of popular sovereignty, as opposed to monarchic right, explains its resolution to neither grant nor request extradition where political acts were concerned, and led it to conclude various extradition conventions containing this exception. The principle was strongly stated and acted upon by Lord Palmerston in sustaining Turkey's

refusal to surrender to Austria the Hungarian refugees of 1849. Since that time extradition treaties generally have contained the political exemption, and the general principle of extradition for common law crimes alone is now widely admitted.

The reason for the modern rule is not far to seek. Consequent upon the French Revolution and the growth of the idea of popular government, honest attempts to subvert existing régimes were no longer looked upon as morally reprehensible; in some cases, indeed, such attempts were regarded rather with favor. Among European nations there is now a fairly general consensus as to what constitutes common law crime. Murder, arson, robbery, embezzlement, and even theft are recognized as crimes by all legal systems. The category of crime is widening, and crimes of fraud are being constantly added to the list, which, at first, contained little more than crimes of violence.

As to political offenses, there can be no common consensus of right and wrong among nations whose governments are founded on no common political principles. Were such a principle recognized, it is quite probable that political acts would be generally extraditable, since an attempt to overthrow the organization of a whole society may be, and generally is, fraught with infinitely more serious consequences than the commission of an offense against any one individual.

Thus a clause permitting extradition for treason, among nations having governments based upon identical principles of popular sovereignty, would be logical and feasible. In fact, such is the case in the United States, in which the Constitution, following in that respect a similar clause in the Articles of Confederation, provides for the rendition by a state of

a person charged in any state with treason, felony or other crime, etc.

As, however, in the present condition of the political world, such a situation does not exist, we are brought to the really difficult question: what is political crime? The term is nowhere defined in the treaties; whether because it was thought too plain by some to require definition, or by others, too difficult to be susceptible of

definition, I do not know. Learned jurists, diplomats, and courts have struggled with it, without hitting upon any yet accepted definition of the term. The general practice of nations has, however, shed some light upon the subject, and the really difficult question can, I think, now be segregated and treated alone.

Acts may be purely political acts, attacks upon the government through the press, seditious speeches or proclamations, etc., and they may be punished as crimes, but as extradition treaties generally make no provision for these, they need not here be discussed.

The real difficulty arises from mixed crimes; i. e., those which, such as murder or arson, are punishable at common law, but which were committed from a political motive rather than for mere gain or revenge. Murder and robbery even when committed under the cloak of insurrection may well be treated as common crime; we learn on the highest authority in the case of a certain Barabbas,

> And there was one named Barabbas, which lay bound with them that had made insurrection with him, *who had committed murder in the insurrection.* — *Mark ch. 15*, v. 7.

Ordinarily, the extradition treaties would apply to these offenses, and it is necessary for the prisoner charged with them to prove that the acts were political. Practically there are two categories of acts otherwise common law crimes, which might, by reason of their political purpose or object, be claimed to be political offenses:

(a) isolated acts of violence not done as part of a general uprising, insurrection or political disturbance;
(b) acts done in the course of and intended to further a political revolt or insurrection.

The desire to further a political end is the only element differentiating the first category from ordinary crime. I shall spend no time on that class of cases. While it was long disputed as to how far the assassination of a ruler could be classed as a political offense, international usage, growing sense of humanity, horror at the acts of such men as the Phœnix Park murderers, or a Booth or Czolgolz, have caused governments generally to treat such miscreants as guilty of atrocious crime alike repugnant to all members of the family of nations.

It is common now to make an exception in treaties, exempting from the category of political offense, assassination of rulers. This, it may be suggested, leads to the inference, that other political personages might be assassinated, and their assassins treated as merely political offenders; suffice it to say, that a different view has been generally taken and the murderer of a minister or magistrate is surrendered as any other murderer. This was the case recently in Switzerland when a magistrate was killed and the murderer was returned to Russia. Such a result is surely sound. If an officer may be killed with impunity by any one who does not approve of the government, why not equally exempt the individual who robs the government to procure funds for the maintenance of a political party? If political murder, why not political theft? Indeed, a man who had forged a will to get a succession, fled to Switzerland and when his extradition was demanded by Russia, (1873) claimed that he had stolen the money to give it to a revolutionary society; but even Swiss sense of humor was aroused, and his defense was held insufficient.

I think it may be fairly said without prolonging the discussion on this head, that the consensus of opinion to-day among the nations is to treat as a murderer, any person who kills another with no other justification than that the latter held an office. The lot of the office-holder is not now so superlatively happy that equal justice should require his slayer to take rank in the gallery of great patriots.

It is generally admitted that anarchistic crime does not fall within the category of political crime. All nations recognize the absolute necessity for some kind of government. Persons whose mental and moral deficiencies lead them to commit acts of violence with the motive of destroying organized society, in the name of a Utopian dream, and of reducing civilization to the condition of the primeval horde, obtain no sympathy from the nations. An able writer has tersely characterized this type as:

A man who commits murders and thefts is a man who has not the endowment of feelings which constitute the foundation of moral sense and who is, therefore, an abnormal man. Thus, whenever, an offense is perpetrated which presupposes, like murder and theft, the

absence of the minimum of pity and probity required for the normality of the moral type of man, the denomination "political crime" becomes misleading. There we have crime pure and simple. — *Tosti, Anarchistic Crime, Political Science Quarterly, Sept., 1899.*

This view in less scientific garb is found in the English and American decisions.

In 1894, one Meunier attempted to blow up some barracks in Paris and when arrested in England, in an extradition proceeding, pleaded among other things, that the offense charged was of a political character. To this the court said:

It appears to me that in order to constitute an offense of a political character, there must be two or more parties in the state, each seeking to impose the Government of their own choice on the other, and that if the offense is committed by one side or the other in pursuance of that object, it is a political offense, otherwise not * * * the part of anarchy is the enemy of all Governments. — *In re Meunier, 2 Q. B. D. 1894.*

Our own supreme court has taken substantially the same view. The anarchist propagandist Turner was held to be properly and constitutionally excluded under the immigration law, not because of the commission of any acts of violence, but because his views were dangerous as incentives to violence. The Honorable Chief Justice admirably summarized the necessary limitations upon freedom of speech:

We are not to be understood as depreciating the vital importance of freedom of speech, and of the press or as suggesting limitations on the spirit of liberty, in itself unconquerable, but this case does not involve those considerations. The flaming brand which guards the realm where no human government is needed still bars the entrance; and as long as human governments endure they can not be denied the power of self-preservation, as that question is presented here. — *Williams* v. *Turner, 194 U. S. p. 279.*

The Institut de Droit International (1892) admirably stated the principle applicable to anarchistic crime.

Crimes directed to uproot the fundamental social institutions, irrespective of national divisions or of any given political Constitution, or form of Government, are *not* to be considered as political crimes.

The bearing of this upon the programmes of certain political associations whose aim seems to be a general suppression of the economic basis of all present societies is not far to seek.

There remains, however, the really difficult question of an offense committed in the course of some uprising or insurrection. Of this class of cases there is yet no treaty or statutory definition. I can find only one case in which the question was adequately or fully discussed and a definition attempted. In 1901 the British Government was asked by Switzerland to surrender one Castioni.

It appears that a number of citizens in one of the Swiss cantons, feeling some dissatisfaction with the government, rather than resort to the ballot box for redress, seized an arsenal, provided themselves with arms, attacked the municipal palace, disarmed the police, imprisoned some members of the government, and established a provisional government of their own. During the course of the attack, the prisoner, who had taken part in the movement throughout, shot with a revolver and killed an officer of the government. He was arrested in England, committed for extradition on the charge of murder and sued out a *habeas corpus*. His defense was political crime. The court of Queen's Bench, apparently for the first time in England, somewhat elaborately considered the question and adopted the definition found in Sir James Stephens' History of the Criminal Law, (Castioni, 1 Q. B. D. 149, 1891) as the clearest definition of the term "political offense." The language of Mr. Justice Stephens, who also was a member of the court at the time, is as follows:

I think, therefore, that the expression in the extradition act ought (unless some better interpretation of it can be suggested) to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes if those crimes were incidental to and formed a part of political disturbances.

Such a disturbance was found to have existed and the prisoner's act to have been one of its logical incidents; hence he was discharged from custody.

The court also discusses a suggested definition by Mr. John Stuart Mill, the political philosopher, which he had formulated while a member of the House of Commons:

Any offense committed in the course of or furthering of civil war, insurrection, or political commotion.

The judges, however, thought the definition of Mill too broad, as offenses might well be committed in the course of a revolution and yet be so separable from the objects of that revolution, as to be properly treated as mere common law offenses. By striking out the words "in the course of," the definition of the great economist becomes at least as good as that of the eminent judge and writer.

Accepting the court's definition as embodying the general view entertained on the subject, as to what constitutes political crime, we find that two conditions must concur to bring the act, otherwise criminal, within the exemption. These conditions are:

(a) the existence of political revolt or disturbance;
(b) the fact that the act in question was incident to and formed a part of such disturbance.

These two questions are of an entirely distinct character.

The latter is one purely justiciable in its nature: was the prisoner affiliated with any organization, did he act under orders, and similar questions, are matters of everyday inquiry in our courts. On the other hand, the question as to political revolt in a foreign country, is logically and properly not within the jurisdiction of courts at all. On the continent of Europe generally, the whole question of extradition is decided by the political branch of the government, and it has been claimed — and justly — that this is not a good system, it being preferable to have the matter, or to be precise, that part of it which is admittedly justiciable, submitted to some tribunal, as is done in England and the United States, thus the point that I am about to suggest arises in those countries alone.

Our supreme court has repeatedly determined that matters of a political nature are exclusively within the determination of the executive branch of the government. The question as to what are the boundaries of a foreign country, or what is the legitimate government, and all general political and geographical facts concerning it, are matters for the executive department, rather than for the courts. The courts of our country will not pass judgment upon the acts of sovereign states.

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. — *Underhill* v. *Hernandez, 168 U. S. 250.*

Questions as to the existence of an insurrection or belligerency are matters to be determined by the Department of State and the courts will follow their decision in such matters, as was said by the supreme court in the case of *The Three Friends, 166 U. S. 1:*

We are thus judicially informed of the existence of an actual conflict of arms in resistance of the authority of a government with which the United States are on terms of peace and amity, although acknowledgment of the insurgents as belligerents by the political department has not taken place.

The reason for all this is obvious. The internal politics of a friendly nation are not matters upon which our courts can or should properly pass. Aside from the unfortunate diplomatic consequences which might follow from such action on the part of the judiciary, the courts are not equipped with the machinery necessary for the ascertainment and decision of such questions. Whether the republic of Venezuela is at peace or whether rival factions are struggling for the mastery, is not for our courts to determine. If every petty judicial officer in the United States to whom extradition cases are referred is justified in determining whether or no a revolt or revolution existed in another land, we may at any time have a curious and embarrassing situation. A federal commissioner in Chicago might well decide that revolution was flagrant in the Russian Empire and that organized insurrection existed; while some state court

in New York might hold that there was no disorder sufficient to constitute a condition of political revolt. This illustrates the unwisdom of allowing the courts to decide political questions. It is true, as appears in the Castioni case, just cited, that the English courts (and apparently American courts likewise) have treated the question as one of fact to be judicially ascertained and determined; but no discussion of the wisdom of such a rule has taken place, and it would seem to me entirely competent and proper for a statute of the United States to enact that where the question of complicity in an insurrection in a foreign country is used as a defense to extradition, the commissioner or judge should obtain from the State Department its determination as to the existence of such a condition. I am unable to perceive any reason in logic or in sound sense why this should not be done.

It is probably owing to the very few cases of political offense that have so far come before the courts that the attention of Congress has not been called to the advisability of such an amendment to the law. But the possible danger to our international relations of leaving such questions to any one of the committing magistrates throughout the country, state or federal, is obvious, and the need for precluding it, imminent. Can it be pleasing to a foreign nation, with whom we are upon the best of terms of friendship, to learn that a commissioner in extradition has found, as one did recently, that the whole empire, including the district in which the offenses were committed, was in a state of revolution? The fact that, geographically speaking, only a small portion of a very vast empire was affected by anything in the nature of revolt, may serve to palliate, but scarcely to wholly allay, the impression created in the country referred to. Nor would the converse of the suggestion be well received by our people nor by our State Department. Should a foreign court decide that some amiable and gentle night riders, who might have fled Kentucky justice, were immune from extradition because the American empire was in revolution, the suggestion would probably meet a very cold response from the American people. It is neither wise nor just to charge the judiciary with the responsibility of such questions. When the decision is once

made, if it discharges the prisoner, the State Department has no further control over the matter; a political question has thus been decided, without even right of appeal to the only branch of the government properly equipped to determine it and a possible international controversy set on foot without any opportunity afforded the executive to avert it.

Such questions, indeed, must be decided, but as the responsibility for their decision ultimately falls upon the government, and can not be evaded by delegating it to a commissioner, would it not be better to have the question determined in the first instance definitely and finally by the State Department?

I am aware that not only have English and American courts treated the question as a judicial one, but that we have the high authority of Mr. J. B. Moore in favor of the practice (29 American Law Review). However, he treats the matter as one more or less settled by usage and the language of the British extradition treaty:

> At the end extradition, whatever may be the character of the offense, is a political act; but prior to that stage, it is both in the United States and in England chiefly a judicial proceeding, in which the person charged is entitled to be set at liberty whenever he has shown that his detention is not warranted by the treaty.

It is a political act, and it is only the occasion for its exercise which is to be judicially determined, because that occasion is the proof of a fact justiciable in its nature; but when the nations by treaty agree that the entrance of a political factor into the otherwise justiciable act shall exempt it from judicial action, the existence of that political factor is a political question to be first determined as a preliminary jurisdictional fact.

As the cases on the subject are few, the present practice can not be regarded as settled by a course of judicial decisions; nor has it been settled as the result of any real consideration or discussion. The object of this paper being to suggest amelioration in the law, rather than merely to recapitulate the precedents, I have no hesitation in suggesting that both England and America might wisely and well take a leaf from the European book in regarding the existence of insurrection in a foreign land as a political fact, while Europe

might well copy the English and American practice in treating the question of the actual criminality of the accused as an ordinary triable fact.

One more difficult question remains: can not some further limitation be placed upon "political offense" other than that already adopted by the courts and the general practice of nations, in refusing to consider as political crimes, the atrocities committed by anarchists and the assassinations committed by individuals except in the course of civil commotion seriously akin to war?

Modern invention has made it easy for a few to do enormous injury to life and property. Under the criminal law of the state of New York, three men acting together are sufficient to create the quasi-political condition of "riot." With a sufficiency of dynamite and an ardent desire to overthrow the hated capitalistic régime in favor of a Utopian socialistic republic, much might be accomplished in the way of wholesale assassination. Would the law-abidding citizens of the Imperial State regard with equanimity a decision of a European government that the three men so acting were entitled to a safe and comfortable asylum in Paris, because, forsooth, they were political offenders merely, whom the New York law itself had characterized as "rioters?" Would our feelings be greatly different if the number of those who had taken part in the riot had been three hundred rather than three? An extreme case! The fallacy of mere logicians, I am told. Yet would not such a case fall within the English definition of political disturbance? Must we not find some more precise and workable definition?

The need of some limitation is pretty generally recognized. For instance the Swiss-Austrian treaty of 1888 provides that political refugees may be surrendered although they are also charged with political crime, provided that they will only be prosecuted for the common law crime. The difficulty with this system is that it leaves to the demanding country the decision of whether the offenses are political or of common law. The Swiss law provides also that extradition will be accorded even where the accused alleges a political object, provided that the acts constitute mainly a common law crime. In practice it may not always be easy to disentangle and weigh the

two elements, but the distinction seems to me to be a step in the right direction, and its establishment is no more difficult to diplomatic than to judicial acumen. It would preclude the possibility of failure to extradite in some such cases as that mentioned above, where the smallness of the number, and the utter hopelessness of the cause, rendered the act really a crime against the common law, however political the motives of the rioters may have been. The fanatically political and social motives of the famous John Brown can scarcely be questioned. Yet under such a criterion as this Swiss-Austrian treaty proposes, his mad attempt to incite slave insurrection would be treated as common law crime.

We find an apposite illustration in our new possessions. For years discontent with political and economic conditions coupled with the natural instinct of man to revert to primitive barbarism led, in the Philippine Islands, to the condition called Ladronism. These ladrones were, in fact, bandits and robbers, but they acted in organized bands, lived in the open country and claimed that the motive of their acts was political. The question as to whether they plundered and murdered because of their political principles or whether the latter were a mere convenient accessory to their purely predatory instincts and operations, has been resolved by the statutes in force in the Philippine Islands and by the decisions of the Philippine Supreme Court in several cases. (*U. S.* v. *de Leon, et al., 3 Phil. Rep. p. 644.*) The defendant in this case and his associates were charged with highway robbery and brigandage, and their principal defense seems to have been,

> That the organization had for its object to attack and contend with the constabulary forces and municipal police of the towns for the purpose of appropriating to themselves arms and ammunition and to supply themselves for the purpose of forming an army for a future insurrection; in other words, that the band was of a political nature and that the appropriation of property by the band was for the purpose of supporting them in attaining political ends.

We thus have here in one of our own courts a forceful and perfectly clear plea of political crime. The court makes short work of the contention, for it holds as follows:

In several cases which have been decided by this court where it appeared that the organization of the party was of a political nature and that the members who formed such party or band committed acts coming within the definition of Act No. 518 against the highway robbery or brigandage, they may be properly convicted under this Act. (p. 646.)

Is there any reason or logic in treating one of our citizens or subjects as a highway robber or brigand, while considering a foreigner guilty of the same acts as a merely political offender, innocent of ordinary crime and outside of the purview of extradition treaties?

Should some of these ladrone gentlemen, feeling depressed by the insalubrious proximity of the Philippine constabulary seek refuge in Russia, perhaps at the invitation of the "Brothers of the Woods," it is not improbable that the United States might seek their extradition. Should that country apply our own standards, might it not well say that as the acts in question were committed by members of a band in chronic hostility to, and in insurrection against, the government of the United States, the offenses were of a political character, and immunity, at least, if not fame, should await these malignly so-called robbers?

A rule such as that found in the Swiss law would aid in the solution of such cases.

A case very recently decided by the State Department illustrates the necessity for some revision of the commonly accepted American view. In the case of Christian Rudovitz, a Russian subject whose surrender was requested by Russia in accordance with the extradition treaty, the facts as stated in the language of the Secretary of State refusing the surrender, were:

That on the night of January 3rd, 1906, a party of some sixteen armed men, masked and disguised, came to the little village of Benen on the estate of Benen and, having gained entrance into certain houses of the village, killed a man (Kristian Leshinsky), his wife (Trina Leshinsky), and their married daughter (Wilhelmina Kinze); that they also robbed the Kinze woman and her husband (Theodore Kinze) before killing her; and that some time during the occurrence they set fire to the house in which they had found and killed the mother, Trina. It does not appear that the men

implicated in the affair gave at the time any reason for the killing of Christian and Trina Leshinsky, though they are said to have declared that they killed the Kinze woman because she was a "spy."

The defense was that the acts were done under the orders of and by members of the Social Democratic Party. Consequently the State Department concluded:

In view of these facts and circumstances the Department after a mature and careful consideration of the evidence so adduced in this case, finds itself forced to the conclusion that the offenses of killing and burning with which the accused is charged are clearly political in their nature, and that the robbery committed on the same occasion was a natural incident to executing the resolutions of the revolutionary group and can not be treated as a separate offense, certainly not as a separate offense by this man without some specific identification of him with that particular act, and of this there is no evidence whatever. Therefore, none of these offenses is such as will afford a proper and sufficient ground for the extradition of the accused to Russia. Neither the treaty nor the law of the United States limits the protection of political characters to acts which are approved by the Government from which extradition is demanded. However much the Government of the United States may deplore or condemn acts of violence done in the commission of acts for a political purpose, however unnecessary or unjustified they may be considered, if those acts were in fact done in the execution of such a purpose, there is no right to issue a warrant of extradition therefor.

Without in any manner intending, other than by indirection, to criticise the decision of the Department it seems obvious that the reasoning here adopted would place the Philippine Ladronism propaganda in the domain of politics. If this be the law and the United States is forced to refuse extradition for acts which are abhorrent to rudimentary notions of morality, is it not time that some change be made in the law? Are we to be slaves to mere legalism, or will we try to fulfill the real purpose of extradition, viz.: remove from this country those persons whose brutal and hideous conduct, whatever its ultimate causes may have been, make them dangerous and unfit members of our society?

But we will be told if you refuse an asylum to a Rudovitz, you may be forced to do likewise in the case of a Lafayette. Not at all.

Is legal language so feeble that we can find no rule to differentiate between acts which excite our severest condemnation and those which may well be admired?

The problem is not altogether new, and other solutions than that of the Swiss law have been proposed.

The Institute of International Law in its session at Oxford (1880) adopted the following resolutions:

In order to judge the acts committed during a political revolution, or an insurrection, or a civil war, the State upon which the demand (of extradition) is made must decide whether it would be excusable by the law or war;

and at the same session passed another resolution which may, I think, be said to be declaratory of the present general practice:

Acts which unite all the characteristics of common law crime (murders, arsons, robberies) should not be excepted from extradition solely by reason of the political intention of the perpetrator.

The system suggested in the first resolution is called that of war usage.

This system has not as yet met with any general adoption. The Spanish law, however, defines and limits political crimes as follows:

All attempts committed during a rebellion, against the public authorities, which would not be punished, under existing law, if they had been done by regular armies, or persons belonging to regular armies in time of war.

This proposed system has been criticised on the ground that war usages themselves are somewhat undetermined and that in civil wars, especially in the beginning, it is impossible to observe these usages. It has, however, the great virtue of distinguishing between the means and methods by which a political result may be obtained, and in so doing is in accord with the growing sentiment of the age to which murder and robbery are ever growing more abhorrent. It is a distinctive element of recent civilization that a common and international accord has been reached to mitigate the horrors and even the severity of war, and to condemn in its pursuit or under its com-

pulsion every avoidable cruelty and every wanton or needless destruction. Is it too much to expect that at least the same measure or standard shall be applied to the acts of revolutionists or political malcontents, and that these shall not be permitted or encouraged to commit under the eupheuism of political offenses acts which the common accord of nations classes as crimes against life or property?

A somewhat modified form of this doctrine was presented by M. Alberic Rolin at the Geneva (1892) Session of the Institute of International Law and adopted. Among other things, it provides that:

As far as concerns acts committed in the course of an insurrection or of a civil war, by either the one or the other of the parties engaged in the strife, and committed in the interest of the cause extradition can only be granted for those which constitute acts of barbarism and of vandalism forbidden according to the laws of order and (extradition shall be granted) only when the civil strife has ended.[1]

Under such a system our State Department would no longer feel under the necessity of offering apologies for having refused extradition for acts which it "deplores" and "condemns."

In conclusion, then, let me suggest that the time has arrived to modify our law and treaty clauses as to political crime. Social expediency, broadening sentiments of humanity, regard for the morals and welfare of our own citizens, together with an appreciation of conditions which show social discontent as frequently resulting in a form closely akin to anarchy would seem to demand that some limitations be placed upon the vague term "political offense."

These limitations upon the usual treaty clause might be in substance as follows:

Political offense shall not be deemed to include either

(1) individual acts of violence containing all the elements of common law crime, even though perpetrated from a political motive or with a political intent or design;

(2) such acts when committed from motives of or to promote anarchy or the dissolution of all political organization;

(3) or acts committed during an insurrection or civil war which constitute odious acts of barbarism forbidden according to the laws of war.

[1] *See* Pandectes Français Art. Extradition, vol. 31, 430.

And further, I should suggest an amendment to our extradition act requiring that the fact of the existence of insurrection in a foreign country, when raised as a defense to a demand for extradition be determined in the first instance by the Department of State.

Before closing, one word as to right of asylum. Much has been said in public meetings and in the public press about asylum. The fact that the doctrine is unknown to international law and has never been recognized will not, in all probability, prevent our hearing much about this sacred right in future. It may be well to bear in mind, however, what our leading international lawyer and publicist, Professor Moore, has said on the subject:

It has been the policy of the United States to discourage the granting of asylum, not only because it has no foundation in international law, but because it has often been found to involve an unwelcome interference in the affairs of other nations, and to be injurious both to national interests and to international relations. — *John Bassett Moore, XXIV American Law Review, "The case of the Salvadorean Refugees."*

With this inadequate discussion, I leave this broad and difficult subject in the hands of the wise statesmen and skilled jurists who preside so ably over our foreign relations.

The Chairman (Mr. Davis). The hour for the duly-appointed meeting of the Executive Council having arrived, I am directed to announce that the Council will meet, not in the Library, but in the Yellow Room, opposite the Red Room.

The discussion will be continued by the Honorable Julian W. Mack.

ADDRESS OF MR. JULIAN W. MACK, OF CHICAGO, ILL.

Mr. Chairman, and Gentlemen of the Society: I regret extremely that Honorable William J. Calhoun, who, jointly with me, was to have presented some views on the subject of the nature and definition of political offense in international extradition, has been unable to

attend this session. His experience and knowledge, both practical and theoretical, in international affairs, as well as his intense love of human liberty, would undoubtedly have caused him to present the liberal, or perhaps I may say, the radical view of the question, in a much more convincing manner than is possible to one who is utterly without practical experience in these matters, whose studies have been but slight in the field of international law, and whose interest has been awakened primarily because of recent events in this country bearing upon the problem at hand.

I am indebted to Professor Roscoe Pound of Northwestern University for many suggestions as well as for references to the literature of the subject.

I shall struggle as earnestly, though I am incapable of struggling as vigorously as has the last speaker, toward judicial impartiality. I shall however not be hampered, as he frankly confessed that he was, either by retainers had or by retainers still to be received, from powerful and despotic governments. I shall be hampered, perhaps, by a devotion to the cause of human liberty, which has induced me to give considerable time in the Rudovitz case, and which I trust will induce me in any future similar cause to give of my time and my strength.

As Rivier says (page 352): "Few rules has occasioned more doubts, more discussions and more errors than that which excludes political offenders from extradition."

Let us consider for a moment the history of extradition and of the exemption of political offenders.

It is established by the authorities that from ancient times extradition was practiced, not as a matter of right, but as a matter of courtesy between states. Mutual jealousies limited the scope of its operation. No conception of an international duty to punish offenders prevailed, and no interest in the state of refuge to assist another state in punishing its criminals could be found.

Gradually, however, states did recognize that they must at least to some extent help one another in maintaining political government; that if the life and safety of one was endangered, the threatening doctrines and acts might in their growth extend to neighboring

territory and so imperil the safety of each. Thus it was, that, totally contrary to modern views, not the common criminal but the political offender was the person extradited; international interest in punishing the common criminal had not yet developed.

Hugo Grotius approved the rule of his era when he said (II, 21, 5, § 5):

But this right which we have spoken of, of demanding for the purpose of punishment those who have fled from the territory, has been made use of in this and the ages next preceding, in most parts of Europe, only with respect to those crimes which concern the state, or have in them some unusual atrocity.

Naturally, the Holy Alliance, with its doctrine of maintaining certain principles of government and of preventing revolutionary changes in any of the states, was favorable to the extradition of the political offender, and it was only in the nineteenth century when the people themselves rose up against despotic power that a complete change was effected.

While the modern doctrine of non-extradition of the political offender is called by Pradier-Fodéré one of the conquests of contemporary public law, nevertheless there are authorities of weight who do not assent thereto, and others, who, while assenting, insist upon the necessity of limiting its scope.

Beginning with about 1831, the states which for some decades past had, under treaties, been extraditing common criminals, both as a matter of self-interest and in the general cause of humanity, recognized that neither the cause of humanity nor any self-interest, could possibly justify the extradition of those charged with a political offense. Long before this, however, President Jefferson, Napoleon, and English Parliamentary leaders had protested against the practice.

Those peoples, who, by this time, had struggled successfully to secure political liberty, could never consent to become a party to the infliction of punishment on others, who, in less favored territory, had unsuccessfully endeavored to gain for themselves and for their fellow citizens the same blessings. And so, until about 1885, sometimes by express stipulation, although this was by no means necessary, no civilized country would deliver up a political offender.

Certain reactionary tendencies, however, showed themselves from time to time. In 1850, Belgium introduced the Belgian *attentat* clause, that an attempt upon the life of the sovereign of a foreign state or a member of his family should not be deemed a political crime when such attempt comprised the act of murder, assassination, or poisoning. In 1881 Russia endeavored to secure the universal adoption of this rule by an international conference, but England frustrated the attempt.

In 1885, and later, however, Russia, whose demands for the extradition of fugitives that had taken part in the Polish revolution of 1830, had caused the more modern states to recognize the need of protecting the political refugee, did succeed in inducing some of the European states, not merely to adopt this clause, but, going far beyond it, to consent to the extradition of certain clearly political offenders. And by the treaty of 1887 between Russia and the United States, this country was led to do what England has ever refused, namely, to provide specifically without limitation and therefore, perhaps, without exception, that the assassin of a foreign sovereign, or member of his family, should not be deemed to be a political offender.

To the rather tortuous history of the doctrine of the exemption of political refugees from extradition, and to the fact that it is still in the process of development, may be attributed the conflicting views as to its limits and the inability to reach a clear and universally acceptable definition of a political crime.

What then is the real nature of a political offense as the term is used in extradition treaties?

We must note, in the first place, the use of the expression "purely political offense" in some treaties. It has been urged that when this phrase is employed, only what Lammasch calls "the absolute" as distinguished from the "relative" political crime is exempted, and that therefore both the "complex" and the "connected" crimes are extraditable.

But our government in the San Ignacio case refused to accept this reasoning, because, as Secretary Sherman said:

It is tacitly implied in all extradition treaties that when they exclude political offenses, connected or complex crimes are not in-

cluded, since crimes of an absolutely or purely political character are excluded by implication, and the use of the word "purely" therefore would seem not to give any extension to the right of extradition. If, however, it does not give any such extension, it must be by construction, since the meaning of the term is not defined by treaty; but the right to personal liberty may not be taken away by mere judicial construction, especially where, in cases of doubt, the obligation of extradition is interpreted in a limitative manner, and in favor of the right of asylum. * * * Never was a political revolution without some of the elements of lawlessness attending it, even against the will of its leaders.[1]

In many treaties the expression used is not merely "political crimes," but also "offenses connected therewith." It has been objected to this phrase that it is much too broad; that is, that literally construed, every act committed during an insurrection would come within its terms. Such, however, has not been the interpretation given to it. It may be doubted whether the clause has helped in any manner, inasmuch as it is clearly settled that the words "political offenses" are under no circumstances confined exclusively to the so-called purely or absolute political offenses, but include, at any rate some of the so-called complex, connected, or relative political crimes.

The distinction between the absolute and the relative political offenses is that the former have a purely political character and do not at the same time contain in themselves the elements of a common law crime; as, for example, a conspiracy against the safety of the state, without any such overt act as, in itself, apart from this specific intent, would amount to a common crime.

There is no difference of opinion as to these absolute political offenses; they never give rise to a right of extradition. The difficulties and the doubts arise in dealing with the other class, in considering the effect of acts which standing alone would be crimes, but for which the privilege of political offenses is claimed because of either the motive that caused them to be committed or the end or purpose aimed at, or both, or because of the circumstances under

[1] 4 Moore's Digest, p. 344.

which they were committed; as, for example, that they were committed during an insurrection, or as part of and in furtherance of an uprising.

Each of these suggested tests has its adherents among the distinguished writers on international law.

The Swiss government has attempted to solve the difficulty by referring the decision as to whether or not the defense of a political crime is valid, to its supreme court, which has to determine freely, unhampered by any legislative rules, and taking into consideration all of the facts and the circumstances of which, even if not furnished by the parties, it will endeavor by its own action to secure full evidence, whether the predominating influence was political or criminal.

Some cases are perfectly clear, for example, a killing by the revolutionary troops in open battle. Here is found the combination of political motive, political purpose, or end, observance of the rules of law and the absence of anything odious to humanity.

But let us take a somewhat more difficult case. The public treasury is robbed by an individual under orders of a revolutionary party, not for private gain, but to enrich the revolutionary treasury, in order that it may more successfully carry on an organized warfare.

Here again, it would seem that both the purpose and the motive were political, although beyond question in some jurisdictions extration would nevertheless be granted.

In a Swiss decision preceding the one referred to by Mr. Coudert, the defendants, charged with having robbed the public treasury, were released, because the circumstances connected with the Georgian revolution were such that the court held this to be a political offense; and the basis of the decision in the case that he referred to was that the defendant was not acting purely in the interest of the revolutionary party; that, considering all of the circumstances and the fact that he brought the money away with him in large amounts and gave but a very small part of it to the various revolutionary sections in Russia, he demonstrated clearly that he was nothing but a common thief.

Suppose that after a theft committed solely to aid the revolution-

ary party, and before leaving the treasury, and therefore of course before any opportunity to hand over the money to the revolutionary authorities, the defendant were caught and subsequently escaped to a foreign country. While in this case it might be difficult to establish the motive and purpose, nevertheless it would seem clear that if they are proved, no extradition should take place.

Suppose, however, instead of being the public treasury, it was a private bank; is it a sufficient defense that the revolutionary party needed money to purchase arms? The most conservative of the jurists admit that if arms had been taken, even from a private individual, to be used by the revolutionary party, the offense would be political.

In the International American Conference in Washington, Mr. Silva, of Columbia, discriminating between an offense of a political character and a common crime, said:

In the revolutions, as we conduct them in our country, the common offenses are necessarily mixed up with the political in many cases. A revolutionist has no resources. My distinguished colleague, General Caamano (of Ecuador), knows how we carry on wars. A revolutionist needs horses for moving beef to feed his troops, etc.; and since he does not go into the public markets to purchase those horses and that beef, nor the arms and saddles to mount and equip his forces, he takes them from the first pasture or shop he finds at hand. This is called robbery everywhere, and is a common offense in time of peace, but in time of war it is a circumstance closely allied to the manner of waging it.

But many contend that the taking of money from private individuals for the purpose of purchasing arms so to be used is too indirect a method of effectuating the ultimate purposes of the party. Yet, as I have just said, the difficulty would seem to be rather in the proof than in the principle.

Suppose, however, no revolutionary party were in existence, that it was just forming, and that these acts were committed to aid in the very formation of it. Here too it would seem clear that both the motive and the aim were altruistic and political, and that extradition should therefore be denied.

The chief difficulty arises in cases of killing and other atrocious acts.

The rules attempted to be laid down by the Institute of International Law in 1880 have been largely disapproved of; the attempted limitation of exemption to those acts which would be permissible under the rules of law is clearly unsound, for, as several distinguished writers have pointed out, not only are the rules of law in themselves not so precise and well settled as to furnish a safe criterion, but as Westlake, a conservative on these matters, says (page 247):

It may be utterly impossible to start such a struggle otherwise than by acts such as an attack on a sentry, which, if viewed in relation to the state of peace out of which they suddenly spring, would be indistinguishable from common crimes, except by the political motive.

It is clear that motives must have much to do with the distinction, but not everything, as well because motives are often mixed as because an admissible motive may be pursued by an inadmissible means.

Take, for example, the assassination of a ruler, the subject matter of a very able opinion by the Supreme Court of Switzerland in the *Jaffe* case (Vol. 27, R. O., page 52).

The court pointed out very clearly that not every assassin could be treated as a political criminal and that not every one of them could justly be dealt with as a common criminal, but that the decision in each case would depend upon the surrounding circumstances. Indeed, they emphasized what they had affirmed in the *Malatesta* case (17 R. O., page 450), that the conspiracy to overthrow the government by violent means and to substitute, not another government, but anarchy, could, under some circumstances, as, e. g., if not followed by atrocious acts, be treated as a political crime, and extradition therefor be denied.

As the court said:

Every crime that can be connected with a political aim can be a political crime, even murder. The character of the crime is determined by weighing the surrounding circumstances. The murder of a king is a typical case of a complex crime. We have often declared that we shall not deny extradition in every such case. But,

on the other hand, we reserve freedom of action and consideration of the circumstances and therefore we have always refused to accept the Belgian clause. Even an anarchist can commit a political crime. * * * An anarchistic crime, as distinguished from a political crime, is not merely an attack on a specific legal right, but it involves the spreading of fear and terror amongst the people, with the aim of destroying the whole human social order, though this be done by means of an attack on a specific legal right. Yet we must not fail to recognize that anarchistic teachings and propaganda can be carried on as purely political measures.

There are individuals indeed for whom the social question is not a political problem, whose aim is to bring about through terrorism a social condition which they themselves can not define in any reasonable manner. These are criminals and have no right of asylum.

It was in this class that they held the assassin of King Humbert to fall, and for this reason they very justly extradited his co-conspirator.

Switzerland has had a number of cases thoroughly considered by its supreme court within the last few years, the last of them being the case of *Wassilieff*, decided in July, 1908, by a six to five decision.[2] His defense of political offense was overruled and he was extradited. I have been unable either in Chicago or Washington to secure the German or French text of this decision and I am indebted to Dr. Samuel Harper, of the University of Chicago, for translating to me a Russian translation of the original opinion.

Mr. COUDERT: I have the German of it and will send it to you.

Mr. MACK: I shall be much obliged to you. I endeavored to show judicial impartiality by referring to this case.

The defendant belonged to the Russian revolutionary party and had killed a police official whom he had never before known and whom he shot down by orders of the party and because of the wrongs committed by him. The revolution was in full blast. The victim was proved to have been a leader in the terrible pogroms.

The court held that the federal government must determine from

[2] Bulletin of Comparative Law Bureau of the American Bar Association, for 1909, pp. 162–164.

the point of view of Swiss law whether the political or the criminal element predominated, and for this reason, among others, they disregarded the fact that the original indictment was, at least in part, for a political offense. The court said:

Looked at from the Swiss point of view, the original indictment gives no help; it merely shows the connection between the murderer and the political offense, but it does not show that the killing could have led to the realization of the aims of the party, or that the crime was committed with the hope of accomplishing this. Relative political crimes exist only when directed against the political or social organization of the state. The aim here was to remedy. The connection between the act and the aim must be direct; it is not sufficient that it be more or less apparent; it must be quite clear. The obligation is on the accused to establish those facts from which the court can determine the direct connection and that the aim is purely political. If the political aim is so remote that he could not reasonably suppose that his act had or could have a direct political effect that would be evident also to third persons, then the reasons for granting the right of asylum fail. Even when the ultimate aim is political yet the cruelty of the means may destroy the privilege. Moreover, a political party can not pass sentence of death and the carrying out of it can not make it a political crime; getting rid of this man would not guarantee the realization of the end.

This case, and especially these last expressions, are not only contrary to the decision of the United States government in the Rudovitz, Ezeta, and other cases, but an important principle therein expressed, namely, that "the obligation is on the accused to establish those facts from which the court can determine the direct connection and that the aim is purely political," is contrary to the views of even the most conservative of all the writers on this subject, Renault. He says, in his famous article in Clunet's Journal, 1880, at page 85: "I admit that in case of doubt extradition should be refused."

Let me digress here, to express my very great admiration for Mr. Clark's study of this subject. I am in accordance with all that he has said, except only one part — the part that treated of the question of whether the plea went to the jurisdiction or the merits and the question of burden of proof. I should like to agree that the question is one of jurisdiction, and that in every case where it is

raised the court may examine into the whole matter. I cannot, however, interpret the decision of the supreme court in that way. As I interpret that decision, the supreme court held that on habeas corpus, in this country — the English law is totally different by statute — the court determines only whether there is any evidence on which the commissioner would reasonably be entitled to render a decision that the party be extradited. If there be any reasonable evidence that it is not a political crime, it is for the commissioner to determine the weight of that evidence, and only if the court can say that there is no evidence on which any reasonable man would be at all justified in granting extradition, can the court intervene and discharge the accused on the writ of habeas corpus. Of course, despite the decision of the supreme court of the United States that it will not discharge because there was some evidence on which the commissioner could have extradited, the State Department on appeal from the commissioner has a free hand, and therefore ultimately the question of whether the party is to be extradited is left to the Secretary of State.

Now, if I may so phrase it, I believe that Mr. Clark has failed to discriminate between two things, a distinction in the law of evidence that is now generally recognized — the distinction between the ultimate burden of proof and the burden of going forward with evidence. I am frank to say that when the demanding government brings forward its case and proves that somebody has been killed by the defendant, it may rest, and if that is all that there is before the court, the defendant would have to be extradited. In other words, the burden of going forward to raise the question of whether there is a political crime or not is on the defendant, because the government satisfies its *prima facie* case by showing that a crime has been committed. Just as in an ordinary criminal case, the government need no go forward with evidence that the defendant was sane. It may rest after proving that the defendant committed the act, and the defendant must then go forward with some evidence to raise the question of insanity. Now, I know that in some jurisdictions even insanity must be established by the defendant in a criminal case, not generally beyond a reasonable doubt but by the preponderance of the evidence. But surely that is not the sound rule; it is not the rule of

the better authorities. The final burden is on the state to prove beyond a reasonable doubt that the defendant as a sane man committed the act with which he is charged, and so too in an extradition case it devolves upon the government, ultimately, to satisfy the commissioner that the defendant has committed an act which is an extraditable crime. A political offender is not extraditable, even though he be a criminal in the country in which the act was committed. In other words, it devolves upon the government to prove, first, that the defendant has committed the act, secondly, if there be any evidence in the case tending to show a political offense, then that that act is a common crime and not a political crime. This does not involve the proof of a negative, as Mr. Clark alleges, but of an affirmative proposition, to wit, that he has committed a crime which is extraditable, namely, a common crime. Every proof of an affirmative involves to some extent a proof of a negative — that is inherent in the nature of things — but the government is not called upon to prove a distinct negative; it is called upon to sustain the case. It is called upon to bring the case within the terms of the treaty and the terms of the treaty are that the only crimes for which a man shall be extradited are nonpolitical ones, whether they be murder, robbery, or anything else. For that reason, I wish to differ *in toto* from the satement of Mr. Clark that the burden is on the defendant, if he means the burden to prove by a preponderance of the evidence that the offense is political. The burden is on him to go forward with some evidence so as to raise the question in the mind of the commissioner as to whether there is a political crime or not. That having been raised, it devolves upon the government to prove that it is a common crime, as it must prove all of the other facts in the case, and that I understand to be the decision of the State Department in the Rudovitz case, as well as the opinion of L. Renault above quoted.

It must be conceded, in accordance with the Swiss authorities, that the mere fact that the demanding government has accused the defendant of political crimes is not in itself conclusive of the character of his offense. The assassination of a sovereign, for example, may be, according to circumstances, either a common or both a political

and common crime — a complex offense. If, for instance, the killing is done either as a matter of private vengeance, or, by the better and generally accepted doctrine, as part of an anarchistic plot not directed against one country alone and its political conditions, but directed against human society in general, the crime is from the point of view of international law a common one. But from the point of view of the demanding state, it may be both a common and a political offense, inasmuch as the effect of the act is not only an attack on the private right of life, but on the public right to the safety of the sovereign. While, of course, after extradition, the prosecution would have to be confined to a conviction and punishment for the common crime, the mere fact that an indictment has been found for the political crime would not of itself always justify the state of refuge in refusing the extradition.

Nevertheless, in looking at all the surrounding circumstances, in determining whether a complex act is predominantly political or not, the fact that the demanding government regarded it as exclusively or at any rate, jointly political, is an element worthy of the most serious consideration.

Moreover, in weighing all the facts, the measures taken by the demanding government against its arrested subjects who were engaged in the same or similar acts are of the utmost importance. Indeed, the fact that the government in its internal relations treats the offense as primarily political may well be deemed decisive, when extradition is claimed under a treaty which contains, not the usual exemption of political offense, but the clause " if it be made to appear that extradition is sought *with a view* to try or punish the person demanded for a political offense." This is the language used in our treaties with Japan (1886), Russia (1887), and Colombia (1888).

Still more convincing is the provision " a fugitive criminal shall not be surrendered if the offense in respect to which his surrender is demanded be of a political character or if he proves that the requisition for his surrender has, in fact, been made with a view to try or punish him for an offense of a political character." Treaties with Norway (1893), Denmark (1902), Peru (1899), Servia (1901), Great Britain (1889), Sweden (1893), Panama (1904), Bolivia (1900), and Chili (1900).

The thought is best expressed in the Brazil treaty of 1897 and 1898 in these words: "Extradition shall not be granted if the offense for which the surrender is demanded be of a political character or if the fugitive prove that there is an intention to try or punish him for a political crime."

The latter clause would be totally unnecessary and superfluous if it did not have this meaning, viz: that irrespective of whether the offense is clearly political or not, if it be shown that the demanding government intended to try the accused as a political offender he is not to be extradited.

Especial attention is to be given such a provision in the treaty when, as in the Rudovitz case, the demanding government is ready, if necessary, to abandon its main charges of murder and arson, but nevertheless, strenuously insists on extradition for the purely incidental offense of larceny or robbery of an insignificant amount at the time and in direct connection with the killing.

Some maintain that assassination, as distinguished from killing in open warfare, is necessarily a nonpolitical crime. Much as one may deplore such methods of securing the highest fruits of civilization — political and religious liberty — nevertheless, as Pradier-Fodéré points out in most eloquent language, what right has one people to judge of the means that another people must use in their struggle for constitutional government and human rights? Assuredly, it is but fair and just in weighing, both morally and legally, the rights of revolutionists, to consider the measures taken by the government itself in its dealings with them. If a government regard it as within its province to suppress every attempt at insurrection by measures, the inhumanity of which is almost beyond conception, who shall say that the opposing party has gone beyond its rights in adopting similar measures?

And let me add, as Mr. Coudert has discussed the facts in the Rudovitz case, that the commissioner and the State Department had official documents, admissions in the reports of the Duma itself, of the commission by the officials representing the government, of the most outrageous, the most terrible crimes — assaults against manhood, against womanhood, against the virtue of women and children; even

the little seven or nine-year-old daughter of Jan Pourren, according to official documents, was tortured to give incriminating testimony against her father.

Oppenheim says, pages 397, 398, and 399:

No revolt happens without complex crimes taking place, and the individuals who commit them may indeed deserve the same protection as other political criminals. And, further, although I can under no circumstances approve of murder, can never sympathize with a murderer, and can never pardon his crime, it may well be the case that the murdered official or head of a state has by inhuman cruelty and oppression himself whetted the knife which cut short his span of life. * * * The Belgian clause goes too far, since exceptional cases of murder of heads of states from political motives or for political purposes might occur which do not deserve extradition.

The Swiss court, in the *Wassilieff* case, while holding that the assassination of an individual not of the highest rank is too distant and indirect a step in the pursuit of the political aim of overthrowing the country, admitted that an assassination might be a political offense, when it said:

Only when the official person personifies the whole political system so that, in public opinion, his overthrow would lead to the changing of the system, could his murder be regarded as political, if any murder of an official could be so regarded.

And despite the apparent adoption of the opposite view by the United States in inserting the Belgian attentat clause in the Russian and other treaties noted above, and the, in some particulars, even more drastic provisions of the Mexican, Haitian, Spanish, and Portuguese treaties, the Swiss view, which has caused her consistently to refuse to insert such a paragraph in her treaties and which is advocated by Oppenheim and other leading jurists, finds expression in our treaty with Brazil of May 14, 1897; May 28, 1898.

The possibility that even an assassination of a ruler may be a political offense is recognized in the clause that such acts shall not be considered political crimes "when they are *unconnected* with political movements."

The language of the Spanish and Portuguese treaties that such

acts " shall not be deemed sufficient to sustain that the offense was of a political character " would seem to permit of proof of surrounding circumstances making them sufficient.

No general principle is laid down in the Swiss decision, the court reserving to itself the right to consider every case in the light of all the surrounding circumstances. Conceding, however, that there may be cases in which an assassination, even at the command of the revolutionary party, could not be claimed to be a political offense, as, *e. g.,* if committed solely for private vengeance because of private wrongs, can it be doubted that there are many other cases in which the contrary is clearly apparent?

Should there be any doubt but that the execution of one charged with being a spy on the revolutionary party, condemned in solemn session, is a political act, a part of the revolutionary warfare, even though the rules of war be disregarded in the manner of carrying out the orders, even though the revolution itself be almost on its last legs? Can such an act be deprived of the exemption because the element of vengeance, vengeance not for purely private but for public wrongs, had entered into it? Aye, more, suppose Marie Spiridonova, a member of, but without orders from, any revolutionary party, after assassinating the inhuman general and governor, whose hands were stained with the blood of hundreds of victims of the pogroms, and whose fiendish atrocities regarded neither the lives nor the virtue of women or children, had, instead of being captured, maltreated, and ravished by those who represented the authority of the state, escaped to foreign lands — a young girl filled with the love of humanity and her fellow citizens, led on to her act by the sorrows and sufferings and tortures that she had seen, aiming to free her beloved country of one of its vilest criminals — would her extradition have been justifiable either legally or morally? The whole people of Russia applauded her act; a despotic government did not even dare to put her to death for it. And yet, if every assassin is beyond the exemption granted to political offenders, Maria Spiridonova to-day, and, as Pradier-Fodéré observes, William Tell centuries ago, heroes though they are among their own people, would have been subjected to extradition.

The justification for extradition lies in the interest of each state in punishing criminals. The justification for the exemption of political offenders lies in the lack of interest of any state in preserving the existence or authority of the specific present form of government in any other state, but more particularly the lack of interest of a state, the people of which have attained to the fullest measure of civil and religious liberty, in protecting a foreign government against the advances of its own people, a government, it may be, that meets every attempt on the part of its people to obtain the barest of human rights with the most cruel and crushing exercise of despotic power.

Oppenheim says, pages 396–7:

I readily admit that every political crime is by no means an honorable deed, which as such deserves protection. Still, political crimes are committed by the best of patriots, and, what is of more weight, they are in many cases a consequence of oppression on the part of the respective governments. They are comparatively infrequent in free countries, where there is individual liberty, where the nation governs itself, and where, therefore, there are plenty of legal ways to bring grievances before the authorities. A free country can never agree to surrender foreigners to their prosecuting home state for deeds done in the interest of the same freedom and liberty which the subjects of such free country enjoy. For individual liberty and self-government of nations are demanded by modern civilization, and their gradual realization over the whole globe is conducive to the welfare of the human race.

While, therefore, it is important that common criminals be extradited freely, and to secure this, that treaties of extradition be entered into between all civilized nations, it is of even greater importance that political offenders be granted, if not the right, at least the privilege and the courtesy of asylum, and that every doubt, if there be doubt, be resolved in favor of human liberty and not against it.

Even the French communists, despite the atrocious character of some of their acts, were not extradited, and as Pradier-Fodéré says (§ 1872):

The correctness of this action is demonstrated, not only by the fact that France herself has pardoned them, but that she has elevated them to some of the highest functions of the state.

It is impossible to say that the civilized countries of the world have reached a common definition of political offense and it is perhaps well that they have not done so.

As Judge Morrow says:

What constitutes an offense of a political character has not yet been determined by judicial authority. *In re Ezeta, 62 Fed. Rep. 997.*

In the *Castioni* case (1891), 1 Q. B. 149, Justice Denman said:

I do not think it is necessary or desirable that we should attempt to put into language in the shape of an exhaustive definition exactly the whole state of things, or every state of things, which might bring a particular case within the description of an offense of a political character. * * * The question really is whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character, with a political object and as part of the political movement and rising in which he was taking part.

Justice Hawkins said:

I can not help thinking that everybody knows that there are many acts of a political character done without reason, done against all reason, but at the same time one can not look too hardly and weigh in golden scales the acts of men hot in their political excitement. We know that in heat, and in heated blood, men often do things which are against and contrary to reason; but none the less an act of this description may be done for the purpose of furthering and in furtherance of a political rising, even though it is an act which may be deplored and lamented, as even cruel and against all reason, by those who calmly reflect upon it after the battle is over.

To quote again from the illustrious author, Pradier-Fodéré (§ 1872):

In my judgment, we must still adhere to the practice of the states according to which it is sufficient that a crime, even a common crime, shall have been inspired by an exclusively political interest, in order that its character shall be modified at least from the point of view of international law. The intention to attack the public and social order being the essential element, an examination of each affair is permissible solely for the purpose of deciding whether one is dealing

with a political crime, * * * and therefore the following simple clause is the most satisfactory in treaties, to wit: "Extradition shall not be demanded or accorded when the crimes or offenses have a political character."

This short formula gives to the state on which the demand is made complete freedom of action, and if that state believes that it ought to refuse extradition, it will need give no other reason than that it, in its sovereign capacity, has determined that the acts are of a political character.

Page 393, Oppenheim says:

To the present day all attempts have failed to formulate a satisfactory conception of the term, and the reason of the thing will, I believe, forever exclude the possibility of finding a satisfactory conception and definition.

To sum up: It is at present impossible to define accurately a political offense for purposes of extradition.

In case of doubt, the decision should be in favor of the defendant, both as a matter of international practice and as the result of the American doctrine of burden of proof. However the treaty may be worded, the demanding government must establish, *prima facie,* both that the accused is guilty and that the act involves an extraditable offense and must therefore prove that the offense is non-political.

There is no conflict as to absolute political offenses. Doubt arises only when the act would be a common extraditable crime but for the political element — the cases of complex or connected acts.

If the predominating element in the light of all the circumstances is political, then there is a political offense — motive, end, aim, purpose, and all surrounding circumstances being taken into consideration.

That the demanding government regards the offense as a political one or treats like offenders at home as political criminals is of the greatest importance, though not absolutely decisive under most of the treaty provisions.

The atrocity of an act or a departure from the rules of civilized warfare, particularly when the demanding government in its effort to

suppress an insurrection employs the same means, does not deprive the act of its political character. Assassination of a ruler or any member or official of a government, as a matter of purely private vengeance, or as part of a purely anarchistic plot is a common crime. If, however, either such an official or even a private individual be killed as a part of the revolutionary warfare, the act does not thereby lose its predominating political character.

The orders of a revolutionary party are not under all circumstances a defense, but, *prima facie*, they will clothe the act with the protection of a political offense unless it be demonstrated that the act was done for purely private purposes and not as part and parcel of the revolution.

Even though the offense charged may be but a step in achieving, though far distant from and but indirectly connected with the ultimate aim, nevertheless the benefit of the doubt to be given to one claiming protection as a political refugee ought ordinarily to forbid extradition in such cases.

If I may be pardoned for digressing from the exact title of my subject, I should add that the methods of determining whether an offense is political or not are even more important than an exact definition of the phrase.

Switzerland has wisely decreed that this question must be adjudicated by its highest court, under a consideration of all obtainable evidence, and that only after its decision can extradition be granted.

Moreover, the accused is granted the aid of counsel learned in the law. Compare that with our present procedure — no aid to the accused unless it be that of private individuals interested in human liberty and in the struggles of revolutionary parties in despotic lands, and instead of the supreme court of the country, a local commissioner who need not be and who, in fact, in at least one famous case, was not learned in the law.

Surely in this country, whose liberties are the result of a revolution, the utmost sympathy must ever be extended to political offenders; not so much for their sakes as for our own and for those of our children must we preserve inviolate the fundamental principles of human freedom and the right of asylum for real political or religious refugees.

Can we be said to be doing our duty if we stand by, and if, far from helping even for the purpose of eliciting all of the facts, we cause the accused to be brought before a man not learned in the law and whose judgment will, but for the intervention and assistance of lovers of liberty, be decisive?

I do not urge that the decision of a court shall be, as it is in Switzerland, final. I believe that we wisely reserve to the executive branch of the government the final right to refuse extradition; but I do urge that the laws of this country be so changed that none but a judge of a court of record shall be competent to sit as an examining magistrate in such cases and that the government of the United States furnish to the accused, counsel learned in the law, to assist in presenting to the court all possible evidence. I urge, too, that statutory and treaty provisions be made, to secure to the refugee the fundamental right accorded in this country to nearly every accused man — release pending the hearing, on furnishing adequate bail.

I hesitated somewhat to dwell at this time and in this place on one other subject. Mr. Coudert's paper and its extremely frank criticisms of our Department of State lead me however, here and now, to add my last suggestion, involving as it does a criticism of the demanding government in the Rudovitz case.

Valuable as our extradition treaties are, there are times when it were better not to have them at all. The reciprocal right of securing the extradition of common criminals is, of course, of ever increasing value as the means of communication between the different countries grow. But any country engaged in a long period of civil warfare can not, in the nature of things, be on a par with other nations. Let me digress. In the Baltic provinces alone, by the testimony, by the official records of the Russian government, one hundred and fifty thousand people were in arms; over one hundred and fifty towns were, for a longer or shorter time, in the possession of the revolutionary party; the revolution reigned supreme throughout the country, even in the city of Riga; and not until the Russian government, successful in other provinces, was able to throw vast numbers of troops into the Baltic provinces, did they recapture these towns and finally defeat the revolutionary party. Since that time the Russian govern-

ment has been engaged in the process of liquidating that revolution and executing as political criminals, after condemnation by military and other extraordinary tribunals, all of those engaged in it on whom it can lay its hands.

It can not be expected that that exact measure of justice, the granting of which by each of the parties in the ordinary courts, is the basis of all extradition treaties, can be given in such a state in such times and under such conditions. When it becomes plain that the ordinary courts of the land are superseded in their function by military and other special courts and that a reign of martial law exists in many sections, has not the time come for carefully considering the advisability of denouncing the extradition treaty in accordance with the terms therein contained? And if, in addition to all this, a country in such a condition demonstrates its inability, in view of the excited state of affairs, to discriminate between political and common crimes, and wrongly continues to accuse political refugees in this and other countries of being common criminals, then surely the time has come to end extradition relations, valuable though they may otherwise be, rather than to subject our courts, our people, and the refugees themselves to the expense, troubles, and dangers involved in such actions.

The CHAIRMAN (Mr. Davis). There being no other business, or desire to discuss this topic further, the Chair will declare the meeting adjourned until this evening at 8 o'clock.

Thereupon, at 5.20 p. m., the Society adjourned.